No. 80-193

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

HENRY BUCZYNSKI, ALEX BORUSOVIC and OTHER RETIREES SIMILARLY SITUATED,

Petitioners,

vs.

THE GENERAL MOTORS CORPORATION,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

REPLY BRIEF OF PETITIONERS

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REPLY BRIEF OF PETITIONERS

I. ERISA prohibits the forfeiture of vested retirement benefits by workers' compensation awards.

The enactment of ERISA was a major reformation of pension law in the United States. Its primary purpose was the protection of employees' and pensioners' rights to receive the pension benefit to which they were entitled. Congress' investigation into the pre-ERISA status of pensions produced evidence not only of abuses affecting a great number of people, but also of many *types* of abuses.[1] The multitude of abuses and the great variety of how those abuses were effected led Congress to enact ERISA to insure that people's rights to receive their pensions were secured. Necessarily inherent in the solution to the problem Congress sought to remedy was a broad proscription against forfeiture of vested retirement pension benefits. Congress was not unaware of the breadth of the forfeiture proscription: those practices it deemed to be desirable were expressly authorized in the statute and allowed to continue. Due to the broad, proscriptive nature of ERISA, which was intended to give broad protection to pensioners' rights, only the express exceptions found in the statute are consistent with the statute.

Respondent, appellees and their various *amici* consistently accuse petitioners and appellants of maintaining a flawed argument, which they conveniently reduce to a simplistic syllogism.[2] Respondent and appellees attempt to characterize the dispute as follows: ERISA §203(a), 29 U.S.C. §1053(a), broadly prohibits all forfeitures of vested pension benefits except those expressly allowed in §203(a)(3). A deduction against pensions for workers' compensation awards is not an express exception and therefore such a deduction is prohibited. Respondent and

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[1] ERISA §2(a); 29 U.S.C. §1001(a).

[2] Brief of Respondent at 7, 15; Brief of Appellees at 2-3; Brief of the United States at 8, 13; Brief of Steel Companies at 14, 19; Brief of ERIC at 5; Brief of Chamber of Commerce of the U.S. at 5.

appellees then argue that the syllogism is flawed because it cannot account for Congress' separate approval of Social Security and Railroad Retirement benefit deductions. They account for this separate approval by claiming that minimum vesting standards were not meant to apply to the defined benefit determined under the plan. It is then claimed that legislation and administrative practice antecedent to ERISA indicate that workers' compensation awards are disability benefits so similar to Social Security disability benefits and Railroad Retirement disability benefits that Congress intended to permit a workers' compensation offset.

It is, of course, always easier to defeat the arguments we would like our enemies to make, than cope with reality.

A. ERISA especially §203(a) bars the offset of workers' compensation awards from vested retirement benefits.

The first error made by respondent and appellees is that only §203(a) prohibits a workers' compensation forfeiture. In fact, petitioners and appellants have consistently argued that not only does §203(a)[3] prohibit the pen-

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[3] Respondent correctly asserts that ERISA §203 became effective vis-a-vis the GM Plan on October 1, 1976, but has erroneously concluded that said section does not apply to forfeitures with respect to individuals retiring before that date (Brief of Respondent at 6, n.1). While citing *Fremont* v. *McGraw-Edison*, 606 F.2d 752 (7th Cir., 1979) and *Dotson* v. *Saginaw Parts*, Civ. No. 79-73728 (E.D. Mich., 1980), as supporting its position, respondent has ignored the line of cases supporting the proposition that it is the date of the forfeiture which determines the applicability of ERISA §203.

See, e.g. *Riley* v. *MEBA Pension Trust*, 570 F.2d 406 (2d Cir., 1976), on remand 452 F.Supp. 117 (S.D.N.Y., 1978), aff'd 586 F.2d 968 (2d Cir., 1978) holding that where benefits were suspended, each month's denial constituted a separate forfeiture. The court found *Riley* to have a claim under ERISA from the date when its vesting provisions became applicable, even though he retired prior to the effective date. In *Morgan* v. *Laborers Pension*

(*Footnote continued on preceding page*)

sion forfeiture, but the entire statute does as well. Respondent and appellees all but concede that §203(a) prohibits the forfeiture, hence their reliance on 26 U.S.C. §401 (a)(5) to defeat the syllogism they have created.

IRS §401(a)(5), first enacted in 1942, permits pension benefit payments to "differ because of any retirement benefits created under State or Federal law." That Congress permitted "retirement" benefits created under law rather than 'all' or 'any' so created, is elementarily obvious. That the Treasury Department impermissably expanded the statute[4] by eliminating the word "retirement" and consequently reaching areas of which they were apparently ignorant, has not been addressed either.

If there is doubt about the construction of §401(a)(5)'s meaning to *limit* the types of benefits permissably used in allowing pension benefits to "differ" "under the plan", then it serves well to look for guidance *in the statute.* IRC

(Footnote continued from preceding page)

Trust Fund for Northern California, 433 F.Supp. 518 (N.D. Cal., 1977) the court held "to determine whether ERISA is applicable to plaintiff's claims, the court must determine if the denial took place after the effective date of the relevant provisions of ERISA." Petitioners submit that *Riley* and *Morgan* constitute the better line of reasoning. See also *Winer* v. *Edison Bros. Stores Pension Plan,* 593 F.2d 307, (8th Cir., 1979).

In *Keller* v. *Graphic Systems of Akron, Inc.,* 422 F.Supp. 1005 (N.D. Ohio, 1976), ERISA §203 was found inapplicable only because the forfeiture occurred prior to the effective date. Petitioners, in the instant case, are protected by §203 since the forfeitures of their pensions occurred after October 1, 1976. Should the Court find §203 not to hinge on the date of the forfeiture, but, rather, on the date of retirement, pre-1976 retirees will be stripped of the protection of ERISA.

In the event this Court finds petitioners herein not to be protected by §203 (due to the effective date), state law would apply. *Keller* v. *Graphic Systems of Akron, supra.* Chapter 156 of the New Jersey Laws of 1977 would then prohibit the offset.

[4] See Briefs of the United States: in the Supreme Court at 7, 11; in the Third Circuit Court of Appeals at 20.

§401(a)(15), and its ERISA counterpart, §206(b), 29 U.S.C. §1056, explicitly deals with the way in which Social Secuirty, the Federal government's mandatory program (and the most significant "retirement" income program in the country), and the Railroad Retiremnt Act (also a Federal program), may be used in determining benefits "under the plan". §401(a)(15), of course, prohibts "decreases" in pension payments if the Social Security retirement benefit "increases" while the pension is being paid. §401(a)(15) is a *limitation* on the use of Social Security retirement as an offset; it is consistent with a narrow construction of "retirement benefits" under §401(a)(5).

The Social Security Act provides that in order for an individual to qualify for disability benefits, one may not have attained the age of 65. 42 U.S.C. §423(a)(1)(B). At age 65 the recipient of disability is ineligible for the *disability* category of benefits and qualifies through the *retirement* benefit category. 42 U.S.C. §402(a)(3). In the case at bar, "normal retirement age" is 65 years. A plan participant could not have Social Security disability benefits offset against a normal retirement-age pension because Social Security disability would cease when the normal retirement-age pension became due. Only Social Security retirement benefits could be deducted from a normal retirement-age pension. This is consistent with the concepts of correlated and like benefits systems.[5] It cannot be seriously maintained that Congress intended Social Security disability benefits to be deducted from normal retirement-age pensions while Congress also made it an impossibility.

There is additional evidence to support the proposition that had Congress intended to permit workers' compensation offsets against retirement pensions it would have expressly provided for such. ERISA §203(a)(3)(B), a prime example of ERISA participation in the definition of the benefit under the plan, is an express exception to the

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[5] 26 C.F.R. §1.401-4(b).

nonforfeitability rule of §203(a) and allows suspensions of pension payments upon certain types of re-employment. If the re-employment terminates, benefit payments begin again. The workers' compensation forfeiture practiced by respondent and appellees operates in an analogous manner: during the period over which workers' compensation awards are paid, the pension benefit is forfeited in a dollar-for-dollar amount. When the forfeiture has been fully effected the pension payments begin again. Both the re-employment suspension and the workers' compensation forfeiture can be euphemistically characterized as 'integration of income to the individual'.

There is, however, at least one overwhelming difference between the offsets for re-employment and workers' compensation: Congress expressly authorized[6] the re-employment exception to the statute's rule of non-forfeitability.[7] Congress recognized that absent such an expression, offsets for re-employment would be forfeitures that violated §203(a)'s rule of non-forfeitability. Congress did not express a desire to similarly exempt workers' compensation from the rule of non-forfeitability, and certainly gave no statutory basis for it.

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[6] Similarly, Congress expressly provided by *statute*—the Railroad Retirement Act of 1974, 42 U.S.C. §231, *et seq.*—that Social Security Benefits would be offset with Railroad Retirement benefits. See also n.18, *infra.*

[7] Another example of the misuse of a phrase can be seen in Brief of Respondent at 24, n.35. The respondent makes note of a totally unrelated and obscure 1962 provision, 26 U.S.C. §401 (a)(7), which uses "nonforfeitability" in a plan termination context. Under the respondent's argument, "nonforfeitability" is invoked as a concept which was well known under pre-ERISA law. This is but another wholly isolated phrase which is being picked out of the hat by the respondents as a means to cloud the clear and unambiguous language and nonforfeitability requirements of ERISA.

B. The statute is paramount to Administrative Regulations, which must be consistent with the statue.

That there was no Congressional intent to provide corporations with a pension loophole for workers' compensation liability is evidenced in the fact that the Treasury Department denies the conclusion of Judge Garth's "legislative regulation" analysis.[8] Treasury's admission that T.Reg. 1.411(a)-4(a), which supposedly includes the result so blithely reached in Rev. Rul. 68-243, is not "legislative" but "interpretive"[9], only puts greater distance between 'Congressional intent' and the 'interpretive' reach of the agency. In essence Treasury admits that the inclusion of workers' compensation within the implied bounds of the regulation was not based on specific Congressional direction, but the agency's interpretation of the statute.

In fact, however, the Treasury admission makes suspect the Third Circuit's entire decision by denying the results of the Court's methodology. The Court extended the greatest deference to the regulation (which does not expressly approve the offset of workers' compensation), because it found the regulation to be legislative. The Court's deference, however, is clearly unjustified. The error was to begin the analysis with the regualtion, rather than the statute.

> "In determining the legality of the Workmen's Compensation offset, then, we must begin our inquiry of this regulation, which, if held to be valid would require us to sustain the offset provisions in the General Motors and Raybestos pension plans." (J.A. 99a)

Apparently, the Third Circuit was ready to decide the case without reference to ERISA.

The Sixth Circuit Court of Appeals did not make these errors in its opinion in *Utility Workers Union of America* v. *Consumers Power Company* No. 78-1402 (6th Cir., Jan.

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[8] J.A. 99a-101a.

[9] See Brief for the United States at 19 n.12.

6, 1981), aff'g 453 F.Supp. 447 (E.D. Mich. 1978), reconsideration en banc denied, (Feb. 13, 1981) when confronted with the identical problem.[10] There, the Court correctly realized that the statute was the primary source of law and began its analysis from there.[11] The Sixth Circuit[12] reached the conclusion that the offset of workers' compensation awards was not permissible under ERISA, where it held:

> "Workers' compensation benefits are paid soley because an employee has sustained an occupational injury within the course of his employment. Such injury is not only the event that triggers the payment of workers' compensation benefits; it is the sole source of the employee's entitlement to these benefits. Accordingly, the reduction of pension benefits by the amount that an employee receives in workers' compensation benefits is not an offset that is in the nature of an offset for social security payments. That is, workers compensation benefits are not a part of 'an integrated and correlated retirement system' that properly includes pension benefits and social security benefits. To the contrary, the reduction of pension benefits by the amount that an employee receives in workers' compensation benefits is an illegal forfeiture that is prohibited by the nonforfeitability provision of section 203(a) of ERISA, 29 U.S.C. §1053(a)." (18a)

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[10] 2a-3a.

[11] Cite to U.S. in A to RB (6).

[12] It should be noted that the decision of the Sixth Circuit in *Utility Workers,* effectively overruled the previous Michigan District Court decisions in *Pavlovic* v. *Chrysler Corp.,* Civ. No. 7-704-38 (E.D. Mich. Jan. 10, 1978); *Bordinc* v. *Evans Products Co.,* 453 F.Supp. 19 (E.D. Mich. 1978); and *Dotson* v. *Saginaw Parts,* Civ. No. 79-73728 (E.D. Mich. Dec. 11, 1980).

Similarly, the District Court in *Employee Benefits Committee of the Retirement System of Hawaiian Telephone Company and Hawaiian Telephone Company* v. *Eleanor Pascoe, etl al.,* Civ. No. 78-0843 (D. Haw., Dec. 15, 1980)[13] began its analysis with statute. It held that:

> "Statutory language in ERISA and its legislative history, the compensatory nature of workers' compensation benefits and the clear policy to prohibit forfeitures except in certain specified instances convinces this Court that offsets of workers' compensation benefits as provided for under the pension plans constitutes a forfeiture under ERISA." (50a)

Even assuming the "legislative" character of T. Reg. §1.411(a)-4(a) as found by Judge Garth in his Opinion below, the regulation is not valid under the appropriate test for such a regulation as enunciated by Judge Garth in *Baker* v. *Otis Elevator,* 609 F.2d 686 (3rd Cir., 1979) and the decision below. The consequence of dropping the word "retirement" impermissably exanded the statute, making it a "clear and manifest conflict . . ."[14]

However, the Court in *Utility Workers* and the Brief of the United States characterize the regulation as 'interpretative', (therefore entitled to less deference than accorded below) and advocated a test of 'plain inconsistency.' Under such a test, the regulation is even more easily seen as contradictory to the statute.

If, however, the inconsistency is seen to be merely literal or superficial (rather than plain) and the regulation is deemed valid then the conclusion is inescapable that the impermissably expansive reach of the regulation occurs in its application to workers' compensation through Rev. Rul. 68-243. This was the result reached by the Sixth Circuit in *Utility Workers.*

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[13] Hereafter called *Hawaiian Telephone Company.*

[14] See also the discussion in *Hawaiian Telephone Company.*
RB].

C. Minimum vesting standards are applicable to the determination of a Pension Benefit.

Respondent and Appellees claim that the minimum vesting standards are separate from and inapplicable to a private plan's determination of the specific dollar amount of pension benefit paid to an individual retiree.[15] They construct a rationale of "benefit definition" or "accrual" obtained "under the plan" to support the proposition that ERISA's §203 was not meant to apply to the dollar amount determined under the plan. Emphasis is placed on the word "claim" in ERISA §3(19) 29 U.S.C. §1002 and its importance in the case of *Nachman Corp.* v. *P.B.G.C.*, 446 U.S. 359 (1980) and the role of collective bargaining and corporate rights in establishing the levels of payouts. The fallacy in this argument is that §203 most definitely effects the dollar amount of pension benefit to be paid; it directly participates in the "benefit definition". It is wrong, as Respondent argues, that the benefit is first determined and minimum vesting standards are then applied.[16]

ERISA, of course, does not dictate a specific dollar amount to be paid. Rather, ERISA sets forth mandatory guidelines with which plans must comply. Some of these guidelines are particularly applicable as to what factors (and to what extent) a plan may or may not use in the *formula* which determines the benefit amount. What is lawfully negotiated by the parties to a plan is the particular monetary amount used in the formula. An individual worker retires with a particular amount of credited years of service and this numerical amount is also used in the formula that determines the specific amount of the pension. Other factors are part of the formula that produces the specific pension amount. IRC §401(a)(15), for instance, dictates to what extent Social Security benefits

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[15] Brief of Respondent at 5, 9 n.6, 11, 15; Brief of Appellees at 4-5; and particularly the Briefs of ERIC and National Steel Corporation.

[16] See Brief of Respondent at 9.

may be used as an offset. The Social Security benefit at the time of retirement, a level established independently of plan benefit levels, directly effects the benefit specifically paid by the fund.

However, one need not look further than §203(a) itself to recognize that minimum vesting standards directly effect, by their participation in the benefit formula, the specific dollar amount of the pension. §203(a)(3)(B) is, perhaps, the clearest example of such participation by establishing the extent to which a plan may forfeit vested benefits due to re-employment. It clearly is an active factor in the determination of what actual benefit is to be paid. §203(a)(2)(A) is another example of the minimum vesting standards effecting the specific benefit paid. It requires 100 percent vesting after 10 years of service, and consequently is integral to the benefit formula structure by setting a maximum length of time (10 years) before pensions must fully vest. Other parts of §203(a) can also be seen as statutory parameters to the benefit formula. It cannot be realistically stated that ERISA §203 leaves the determination of benefits solely "under the plan". ERISA most definitely participates in what specific dollar amount must be paid under the plan. If there is any real consequence in the right to a vested benefit, it is the actual receipt of the full, vested benefit. Otherwise, a right to a claim is meaningless.

The purpose of respondent's and appellees' attempt to artificially deny ERISA §203's applicability to 'benefit definition under the plan' is to allow the (obfuscatory) argument that workers' compensation benefits are so similar to Social Security benefits that they are included within the statutory exception providing for the Social Security and Railroad Retirement offset.

Respondent and appellees attempt to create a conceptual underpinning for the pre-ERISA IRS treatment of workers' compensation and pensions by bootstrapping workers' compensation awards to Social Security disability benefits. Indeed, the *Buczynski* Court found any distinc-

tion between the two to be "meaningless". The *Utility Workers* court, perhaps more cognizant of the real-life functions these very different programs actually fulfill, did not make the same mistake. The Sixth Circuit, by recognizing the fundamental difference between the two types of benefits found that the regulation in question was unlawfully applied by attempting to encompass workers' compensation awards.

Besides the fact that Social Security disability benefits cannot be integrated with normal retirement age pensions due to the structure of the Social Security Act (see *supra*), Social Security disability benefits are so fundamentally different from workers' compensation awards that the latter cannot be honestly likened to the former for the purposes of ERISA. The semantic confusion of the word "disability" when interchanged as a generic term and a term of statutory (or regulatory) art, cannot obscure the actually distinct natures of these programs.[17]

Social Security disability benefits are payable only to persons who cannot "engage in any substantial gainful activity" as a result of the injury 42 U.S.C. §423(d)(1). The disability need not arise in the course of employment. Whereas workers' compensation protection attaches at the first minute of employment, regardless of age, a person is not eligible for Social Security disability benefits unless a certain period of time has been worked in covered employment and the person is older than a minimum age. Workers' compensation awards serve to protect a class of injured persons (employees) that cannot qualify for Social Security disability—employees who suffer from injuries (compensable under workers' compensation) that are anything less than the Social Security disability qualifying standard.[18]

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[17] Another example of the semantic confusion sewn by respondent and appellees is in their use of the word "integration" as a euphemistic label for forfeiture.

[18] The fact that Social Security disability partially overlaps with workers' compensation does not mean the two programs serve

(Footnote continued on following page)

Retirement pensions are similar neither to Social Security disability benefits nor workers' compensation awards. Pensions are wages for work already performed, the payment of such wages being deferred until the employment ceases. The pension amount is the product of a dollar rate and the length of time worked. The normal wage structure is the relation of a rate of pay (hourly, weekly, etc.), to the length of time worked in order to determine the amount of wages to be paid. The identicality of the structures of normal wages and pensions is no surprise given their common derivation from work performed.

Respondent and appellees make the preposterous argument that pensions are not deferred wage payments, but only a guarantee of a maximum income level during retirement years, no matter what the source of the income.[19] Because of the bloated meaning attached to 26 C.F.R. §1.411(a)-4(a) any benefit created under law could be permissably "integrated" with pension plans, regardless of its source, purpose or character.[20] This would conceivably include such payments as Veterans Administration benefits (which can provide retirement and disability pay), state welfare benefits (for which a pensioner could certainly qualify) or even state-run lottery winnings. Respondent's and appellees' intimation that a private reitrement pension is only a guaranty of an old-age income level, in fact, is only a formulation of the idea that a corporation can

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(Footnote continued from preceding page)

the same purpose. Social Security, by providing disability coverage to a broader class than is covered by a workers' compensation determination of 100% total, permanent disability, is expressly authorized by statute (42 U.S.C. §424a) to take an offset of up to 80% of the workers' compensation award. This is a correlated, like benefit system, authorized by statute and significantly, limiting in its nature.

[19] See particularly the Briefs of Appellees and Steel Companies.

[20] Brief of Respondent at 30-36; Brief of Appellees at 14-16.

limit retired workers' income to a specific pension benefit. The plan would use every dollar available under every benefit system created under law to pay off its pension obligation. The corporation, which entered into an agreement to pay retirement pensions, would, therefore, be the last source to pay the pension benefit.

Respondent and appellees assert the equally preposterous proposition that the New Jersey Workers' Compensation Act is not an act providing compensation for work-related injuries, but is premised on a 'wage loss' or 'wage replacement' theory.[21] A 'wage replacement' characterization serves to substantiate the argument that workers' compensation awards are sufficiently similar or 'correlated' to retirement pensions. This is a factually incorrect characterization. The 'wage loss' premise of a workers' compensation program is not the underpinning of the New Jersey program. See *Renshaw* v. *U.S. Pipe and Foundry Co.*, 30 N.J. 458 (1959) and *Dudley* v. *Victor Lynn Lines, Inc.*, 32 N.J. 479 (1960).

What respondent and appellees are incapable of overcoming is the reality that compensation for *partial* permanent disabilities is awarded even where the injured employee has continued to work without any loss of work-time (compensation for time lost from work due to the injury is separately compensable). The same standards of disability are applied to all claimants, whether actively employed or retired. Workers' compensation claims during employment or within the first two years after employment are not deductable from either normal wages or pensions, both under the GM plan and under N.J.S.A. 34:15-29, which prohibits the offset of workers' compensation awards against retirement pensions (but not against disability pensions).

What is even more difficult for respondent and appellees to overcome is the position of the Treasury De-

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[21] Brief of Respondent at 31, 33; Brief of Appellee at 20-24.

partment expressed in footnote 13 in the Brief of the United States:

> ". . . to the extent that a workers' compensation award reimburses the worker for medical expenses *or provides fixed payments for bodily impairment* [as New Jersey's program undeniably does] the Commissioner does not permit such awards to be used to offset pension benefits . . ." (emphasis added)

D. Employers will accure a windfall should the workers' compensation forfeiture be held lawful.

Unabashedly present in the "under the plan" argument are the dual intimations that the GM plan *authorizes* the workers' compensation deduction, and, if the workers' compensation deduction is found unlawful, some kind of windfall, for which the employee did not bargain, will accrue to the pensioner.[22] Simultaneously, the employer, who claims he did not bargain for the increased liability, will incur additional plan funding costs due to past re-

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[22] Brief of Respondent at 33 n. 45, and Brief of Appellant at 21-22, makes note of 3 Larson, Workers' Compensation, §97.10, and its reference to duplicate payments. What the Plans failed to note is that this provision is merely a restatement of earlier editions and reflective of philosophy not in keeping with the subsequently passed Employees Retirement Income Security Act of 1974.

It should also be noted that a finding that the workers' compensation offset is unlawful will not result in the 'double-dip' situation faced by this Court in *U.S. Railroad Retirement Board* v. *Fritz*, 49 U.S.L.W. 4035 (Dec. 9, 1980). In that case, which is factually distinguishable from this one, there was a specific *statutory* prohibition against the concurrent receipt of Railroad Retirement and Social Security benefits under 42 U.S.C. §231 *et seq.*

liance on the offset.[23] Were it not for the prejudicial likelihood elicited by the mere recitation of such charges, refutation would be virtually unnecessary.

The study prepared for the Department of Labor on the precise issue of the impact of workers' compensation offsets on pension plans, found as follows:

> (1) The estimated number of affected pension plans 7,200 or 8.5% of defined benefits plans.
> (2) The estimated number of affected claims is 2,000 per annum or 0.006% of 32,320,000 participants in defined benefits plans.
> (3) The estimated average benefits to affected participants would be approximately $225.00 per month under plans with immediate benefit provisions, and about $340.00 per month under plans with deferred benefits which permit benefit accrual while disabled.
> (4) The estimated increase in annual pension plan contributions runs from 0.22% to only 0.24% of current pension costs.
>
> Hays Associates Analysis of Pension Plan/Workers' Compensation Offsets. Final report, April 13, 1979, contract no. J-9-O-7-0065, p. iii.

The GM plan states ". . . a deduction [for workers' compensation] shall be made, *unless prohibited by law* . . ." The presence of this clause indicates that the parties to the agreement had, at least, some question as to the legality of the deduction well before ERISA was enacted.[24] Prior to a judicial determination of the deduction's lawfulness, and in the face of state laws and enunciated policies prohibiting the alienation of workers' compensation

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[23] Brief of Respondent at 23, n.33 and 38; Brief of Appellees at 4 and 30-31; Brief of Steel Companies at 32; Brief of National Steel Corp. at 2, 16-17; and Brief of ERIC at 3.

[24] Testimony of Hubert Clodfelter, Tr. p. 9, 1.22 to p. 10, 1.13; p. 13, 1.5 to 7.

awards, it cannot be truthfully stated that the contract clause in the GM plan definitively *authorizes* the deduction. The evident doubt shared by the parties as to the legality of the offset raises skeptical questions: Did the GM plan really rely on the offset as a component of the plan's funding? Was the status of pre-ERISA law (the tax code, the Treasury Department's regulations and revenue rulings) as clear or definitive as respondent and appellees now claim in their explanations of law preceding ERISA? Why did GM even initiate the clause, let alone acknowledge its questionable legality?

An examination of the record in this case reveals that the issue of possible economic impact upon the plan was not a subject of this litigation, nor was it an element in Judge Garth's decision. Clearly, GM's initiative to include the offset in the plan[25] was meant to and does chill the exercise of workers' compensation rights. There is no evidence that the GM plan's funding level was somehow actuarily or otherwise, dependent on the utilization of the worker's compensation offset. The first GM plan year after the effective date of §203, began October 1, 1976; there is no evidence that General Motors of New Jersey utilized the offset provision prior to 1977—the first year in which petitioners and other members of their class suffered the offset.

The windfall, alleged by respondent and appellees, in fact exists, but the petitioners and appellants would not gain it. Petitioners and appellants have been adjudicated as suffering from work-related injuries and awarded damages. Respondent and appellees were, of course, represented by counsel in those proceedings. Payment for the injury is the compensation for the bodily loss actually sustained. Money damages for these injuries are not repair or replacement, but compensation. There is no windfall to petitioners when they receive retirement pensions based on years of service and compensation for actual injuries.

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[25] See generally, Clodfelter testimony.

The windfall would belong to the employer if the offset is upheld. Employer funding would then be reduced by the amount of workers' compensation awarded. Plans which had never relied on the offset as part of the plan funding would conceivably be permitted to immediately forfeit pension payments of previously compensated retirees. The various states' compensation programs (as applied to pensioners) would be shams. All retired workers drawing retirement pensions would be deprived of compensation for occupational diseases and injuries.

II. Chapter 156 of the New Jersey Laws of 1977 is a valid exercise of State police power, not pre-empted by ERISA.

In its attempt to argue in favor of preemption of Chapter 156 of the New Jersey Laws of 1977, respondent cites several decisions "striking down one or another state attempt at legislation relation to or affecting employee benefit plans".[26] However, the respondent (and for that matter appellants and amici) have failed to cite a single preemption case involving a state workers' compensation statute. Respondent admits[27] that two cases it cites as standing for preemption, i.e. *Bucyrus-Erie Co.* v. *Department of Industry, Labor and Human Relations of Wisconsin,* 599 F.2d 205 (7th Cir., 1979), cert. denied 444 U.S. 1031 (1980) and *Wadsworth* v. *Whaland,* 562 F.2d 70 (1st Cir., 1977), cert. denied 435 U.S. 980 (1978) actually held against preemption. Therefore, respondent relies on said cases merely for dicta regarding section 514(a) of ERISA, 29 U.S.C. §1144(a). It is also noteworthy that the aforementioned cases involved "employee welfare benefit plans" under 29 U.S.C. §1002(1) as opposed to employee pension benefit plans under 29 U.S.C. §1002(2). Also involving

[26] Brief of Respondent at 46-47.

[27] Brief of Respondent at 47, n.64.

an "employee welfare benefit plan" was *Standard Oil of California* v. *Agsalud,* No. 79-1095 (9th Cir., October 15, 1980) wherein a state law requiring workers in the state to be covered by a comprehensive prepaid health care plan was held to be preempted.

The decision in *Azzaro* v. *Hartnett,* 414 F.Supp. 473 (S.D.N.Y., 1976) aff'd without opinion 553 F.2. 93 (2d Cir., 1977), cert. denied 434 U.S. 824 (1977), although inapposite, is instructive. *Azzaro* involved an inquiry by the New York State Insurance Department into the pension benefit statute of a plan participant. In finding preemption of the state law, the Court stated:

> ERISA offers full protection to the employee involved in this matter. The act provides that the administrator of an employee pension benefit plan must furnish to any participant or beneficiary who so requests a statement of his current status which includes the total benefits accrued. 414 F.Supp. at 475.

Contrary to the situation in *Azzaro, supra,* ERISA does not regulate workers' compensation for the petitioners herein, so preemption should not be found.

The only known decision regarding the validity of a state workers' compensation law under section 514(a) of ERISA is the recent decision in *The Employee Benefits Committee of the Retirement System of Hawaiian Telephone Co., et al.* v. *Pascoe, et al.,* Civ. No. 78-0483 (D. Hawaii, December 15, 1980.) This case involved a pension plan offset provision similar to those presently before this Honorable Court, as well as a section of the state workers' compensation statute[28] not unlike Chapter 156. That Court upheld the validity of the state law, saying:

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[28] Hawaii Rev. Stat. §386-9 (1976) reads,

> Contracting out forbidden. Except as provided in §386-78 (not relevant) no contract rule, regulation or device whatsoever shall operate to relieve the employer in whole or in part from any liability created by this Chapter.

> By including the offset provision in the plan and raising ERISA as support for the provision's validity, plaintiffs (pension plan) are attempting to accomplish indirectly what they cannot accomplish directly . . . The clear policy of the State . . . to prevent employers from taking any action to reduce their obligations to pay workers' compensation benefits bars any relief declaring that the offset is valid . . . (58a, 59a)

The Court further held that "(A)ny possible issue of federal preemption by ERISA of the state workers' compensation law is precluded by the language of ERISA" (Slip Opinion, n.26). The "language" referred to by said Court was that of section 4(b)(3) of ERISA, 29 U.S.C. §1003 (b)(3) exempting from ERISA coverage (and preemption) plans "maintained solely for the purpose of complying with applicable workers' compensation laws . . ." While respondent, appellant and their amici have cited a number of distinguishable preemption cases, they are faced with the reality that the only Court (other than the Court below) which has addressed a state workers' compensation law, in the context of preemption under ERISA, has upheld the validity of the state law.

Respondent glosses over the section 4(b)(3) exemption, stating that said exception is inapplicable here and shows no special deference in the area of preemption.[29] Appellants and amici completely ignore section 4(b)(3) of ERISA. Contrary to the assertion of respondent, it is clear that 4(b)(3), 29 U.S.C. §1003(b)(3) does show deference in the preemption area. Said exemption frees plans maintained for workers' compensation purposes from many of the requirements of ERISA, including preemption. It is inconceivable that Congress would have exempted pension plans maintained to comply with workers' compensation laws under ERISA coverage, while preempting the underlying workers' compensation statutes. If a plan is exempt because it is maintained to comply with a workers'

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[29] Brief of Respondent 42.

compensation statute, the workers' compensation statute itself must be exempt from preemption. Any other interpretation flies in the face of reason.

Two Courts of Appeals have held state laws in the area of familial support (like workers' compensation, a traditional area of the state police power) not preempted by ERISA. In both *American Telephone & Telegraph Co.* v. *Merry,* 592 F.2d 118 (2d Cir., 1979) and *Stone* v. *Stone,* 632 F.2d 740 (9th Cir., 1980), state court garnishments[30] of pension benefits were upheld against preemption challenges. Respondent attempts to avoid the preemption implication of these two decisions by reference to some implied exception to the anti-alienation requirements of section 206 of ERISA, 29 U.S.C. §1056. However, a reading of these decisions shows that the state laws were determined to only peripherally affect pension plans, thereby not being preempted by ERISA.[31]

Chapter 156 of the New Jersey Laws of 1977, a valid exercise of state police power, in an area (workers' compensation) traditionally within the sphere of state police power, *Decanas* v. *Bica,* 424 U.S. 351 (1976), is not preempted by section 514(a) of ERISA, 29 U.S.C. §1144(a).

CONCLUSION

Petitioners and the class of which they are members respectfully request this Honorable Court to find that ERISA prohibits the forfeiture of vested retirement pension benefits by the amount of a workers' compensation award obtained by a pensioner. Petitioners further request this Court to find that N.J.S.A. 34:15-29 is not pre-empted by ERISA.

Respectfully submitted,

MARC C. GETTIS
Counsel for Petitioners

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[30] A state court order is a "state law" under section 514(c) of ERISA, 29 U.S.C. §1144(c). Brief of Appellant 35, Brief of Respondent 43.

[31] See discussion in Brief of Petitioners at 49-50.

APPENDIX A

Opinion of the United States Court of Appeals for the Sixth Circuit in *Utility Workers of America* v. *Consumer Power Company*, No. 78-1402 (6th Cir. January 6, 1981); Rehearing Denied February 13, 1981

No. 78-1402

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UTILITY WORKERS UNION OF AMERICA AFL-CIO, AND ITS MICHIGAN STATE UTILITY WORKERS COUNCIL, LEWIS J. TINKLEPAUGH, CLARENCE J. SEGORSKI, LEO LINGRAM, BURNELL CLOUGH, ROBERT YON, RAY ROGERS AND PAUL DE HATE,

Plaintiffs-Appellees,

v.

CONSUMERS POWER COMPANY, AND THE PENSION PLAN FOR EMPLOYEES OF CONSUMERS POWER COMPANY,

Defendants-Appellants.

APPEAL from the United States District Court for the Eastern District of Michigan, Southern Division.

Decided and Filed January 6, 1981.

Before: ENGLE and KEITH, Circuit Judges, and PECK, Senior Circuit Judge.

PECK, Senior Circuit Judge, delivered the opinion of the Court, in which KEITH, Circuit Judge, joined. ENGEL, Circuit Judge, (pp. 21-23) filed a separate dissenting opinion.

PECK, Senior Circuit Judge. There is a single question presented by the appeal now before the Court: do the non-forfeitability provisions of the Employees Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1053(a), prohibit the reduction of pension benefits by the amount that a pen-

sioner receives in workers' compensation insurance benefits? Although this question appears simple, it in fact raises several difficult issues of statutory interpretation. Not only is the Court required to interpret various provisions of ERISA (in conjunction with related provisions of the Internal Revenue Code of 1954 [IRC], 26 U.S.C. § 1 *et seq.*), the Court also is required to analyze the nature of the workers' compensation benefits that are provided by state law.

At the outset, we note that the question on appeal has recently engendered conflicting decisions in several federal courts. For example, in the United States District Court for the Eastern District of Michigan (the district in which the present action was decided), the exact question before us has now been addressed on four separate occasions. In *Bordine* v. *Evans Products Co.*, 453 F. Supp. 19 (E.D. Mich. 1978); *Pavlovic* v. *Chrysler Corp.*, Civ. No. 7-70438 (E.D. Mich. January 10, 1978); and *Carlson* v. *Bundy Manufacturing Co.*, Civ. No. 6-72274 (E.D. Mich. August 18, 1977), the district court upheld the validity of the so-called "workers' compensation offset" (*i.e.*, the reduction in pension benefits by the amounts that pensioners receive in workers' compensation benefits). Judge Philip Pratt, the district judge in the present case, wrote the *Carlson* decision; however, in his opinion herein reviewed, Judge Pratt, with exemplary candor, reconsidered his reasoning in *Carlson* and reached the opposite result. In the present action, Judge Pratt entered summary judgment in favor of plaintiffs, and held that the reduction in pension benefits by the amount that a pensioner receives in workers' compensation benefits is a forfeiture that is prohibited by the non-forfeitability provisions of ERISA. *See Utility Workers Union* v. *Consumers Power*, 453 F. Supp. 447 (1978). Shortly after Judge Pratt issued his opinion in the present case, two decisions of the United States District Court for the District of New Jersey expressly followed his reasoning therein. *See Buczynski* v. *General Motors Corp.*, 456 F. Supp. 867 (D.N.J.), *rehearing denied*, 464 F.Supp. 133 (1978);

Alessi v. *Raybestos-Manhattan, Inc.*, CA No. 78-0434 (D. N.J. February 15, 1979). However, on appeal, both of these cases were reversed by the Third Circuit Court of Appeals, on the ground that Congress gave its implicit approval to workers' compensation offsets in various ERISA provisions. Based on this holding, the Third Circuit concluded that ERISA pre-empted a New Jersey statute that expressly prohibited pension plans from incorporating workers' compensation offsets. *See Buczynski* v. *General Motors Corp.*, 616 F.2d 1238 (3d Cir.), *cert. dismissed sub. nom. Alessi* v. *Raybestos-Manhattan, Inc.*, — U.S. —, 101 S.Ct. 25 (1980).

We have heard oral argument in the present case, and have reviewed the lengthy and comprehensive briefs that have been submitted by the parties and by the numerous *amici*. After careful consideration, we find ourselves is disagreement with the position taken by the Third Circuit in *Buczynski*, and we affirm the judgment of the district court herein. We are convinced that this result comports both with the statutory language of ERISA, and with the legislative history of the Act.

STATEMENT OF THE CASE

Plaintiffs in the present case include the Utility Workers Union of America, and its Michigan State Utility Workers Council. These plaintiffs are the labor organizations that are bargaining agents for the operating, maintenance and construction employees of defendant, Consumers Power Company. Plaintiffs also include seven individual employees of Consumers Power, each of whom receives workers' compensation benefits under Michigan law, and each of whom is eligible to receive retirement benefits under the Pension Plan for Employees of Consumers Power Company.

The facts of the present case are both straightforward and undisputed. The Pension Plan for the Employees of Consumers Power provides for the calculation and payment of normal or early retirement benefits, in section V-1 of the Plan, as follows:

Appendix A

V-1. Normal or Deferred Retirement Income

The monthly Retirement Income payable to an employee who, at Normal Retirement Date or at Deferred Retirement Date, retires on or after January 1, 1976, pursuant to the provisions of the Plan from the service of the Company, will be an amount equal to the product of the employee's Final Pay times the sum of the percentages determined as follows:

1½% for each of the first 20 years of Accredited Service.

1% for each of the next 10 years of Accredited Service.

½% for each of the next 10 years of Accredited Service. . . .

The Plan further provides, in section V-2, for the reduction of a pensioner's retirement benefits by the amount of weekly workers' compensation payments that the pensioner receives from Consumers Power or its subsidiaries under the Michigan Workers' Compensation Act, MCLA 418.101 *et seq.* (The Plan does not provide an offset for payments that are made in liquidation of claims or for payments for medical expenses that are made by Consumers Power under the workers' compensation law.) Section V-2 of the Plan reads as follows:

V-2. Workmen's Compensation. All workmen's Compensation weekly payments received by a retired employee from the Company, Michigan Gas Storage Company, Northern Michigan Exploration Company, or anyone else making such payments for one of those companies will be a credit against any Retirement Income or any other payments under this Plan. Monthly payments under the Plan will be reduced by the amount of such credit pursuant to the following rules:

(a) The Credit will be based on Workmen's Compensation paid during the preceding month. If Workmen's Compensation payments are made for the entire month, the credit will equal 4-1/3 weekly Workmen's Compensation payments.

> (b) The maximum credit against any Retirement Income or any other payments under this Plan for Workmen's Compensation payments in any month will be the amount of such monthly payments due under this Plan for the succeeding month.

The above provision for a workers' compensation offset, which was incorporated into the Pension Plan in 1966, is the subject of the present litigation.

PLAINTIFFS' ALLEGATIONS

In their complaint, plaintiffs attacked the workers' compensation offset of the Consumers Power Pension Plan on three statutory grounds:

(1) Plaintiffs alleged that the offset worked a partial or total forfeiture of benefits to which the individual plaintiffs had non-forfeitable rights, in violation of § 203(a) of ERISA, 29 U.S.C. § 1053(a).

(2) Plaintiffs alleged that the offset allowed Consumers Power to satisfy its workers' compensation liabilities out of Pension Plan assets, in violation of § 403(c)(1) of ERISA, 29 U.S.C. § 1103(c)(1). That section provides, in part, that "the assets of a plan shall never inure to the benefit of any employer and shall be held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries and defraying reasonable expenses of administering the plan."

(3) Plaintiffs alleged that the workers' compensation offset amounted to an assignment of an employee's accrued retirement benefits for the purpose of satisfying Consumers Power's liability under the Michigan Workers' Compensation Act, *supra*. Plaintiffs argued that such assignment violated § 206(d)(1) of ERISA, 29 U.S.C. § 1056(d)(1), which reads, "Each pension plan shall provide that benefits provided under the plan may not be assigned or alienated."

Upon cross-motions for summary judgment, the district court entered judgment in favor of plaintiffs, holding that the workers' compensation offset violated the vesting and forfeiture requirements of section 203(a) of ERISA. We agree with this conclusion of the district court, and thus we do not reach the merits of plaintiffs' other two allegations.

STATUTORY PROVISIONS/TREASURY REGULATIONS

Our application of the provisions of ERISA to the workers' compensation offset now in question begins with an analysis of the minimum vesting standards that are set out in section 203 of ERISA, 29 U.S.C. § 1053. Specifically, subsection (a)(2)(A) of section 203, 29 U.S.C. § 1053(a)(2)(A), establishes the following non-forfeitability requirement:[1]

> Each pension plan shall provide that an employee's right to his normal retirement benefit is nonforfeitable upon the attainment of normal retirement age and in addition . . . an employee who has at least 10 years of service has a nonforfeitable right to 100 percent of his accrued benefit derived from employer contributions.

In interpreting the scope of this non-forfeitability requirement, several definitions that are set out in § 3 of the Act, 29 U.S.C. § 1002, are relevant. For example, 29 U.S.C. § 1002(19) provides that,

> the term "nonforfeitable" when used with respect to a pension benefit or right means a claim obtained by a

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[1] ERISA contains certain exceptions to this non-forfeitability requirement which concededly do not apply to any of the plaintiffs in this action. *See* 29 U.S.C. § 1053(a)(3). Congress exempted from the non-forfeitability requirement of section 203(a)(2) pension plans which provide that payment shall cease if the survivor dies, plans which suspend payments while the participant is reemployed in certain types of industries, plans in which certain amendments are made retroactive, plans in which members have voluntarily withdrawn their mandatory contributions, and plans that are designed to forestall economic failure.

> participant or his beneficiary to that part of an immediate or deferred benefit under a pension plan which arises from the participant's service, which is unconditional, and which is legally enforceable against the plan.

Further, 29 U.S.C. § 1002(22) defines a "normal retirement benefit" for purposes of ERISA as "the benefit under the plan commencing at normal retirement age," and 29 U.S.C. § 1002 (23)(A) provides that the "accrued benefit" to which a pensioner receives a non-forfeitable right is "the individual's accrued benefit [as] determined under the [pension] plan. . . ."

As a part of their argument to this Court, defendants focus on the phrase "under the plan" that Congress incorporated into each of the three definitions cited above. In essence, defendants argue that a pensioner receives a non-forfeitable right only to those accrued retirement benefits that are provided by the terms of the pension plan. In other words, according to defendants, if a pension plan provides for a reduction in benefits as a part of the plan's benefit computation process, the reduced benefits are the only accrued benefits to which a pensioner gains a non-forfeitable right. We reject defendants' argument for the reason that it proves too much. As the district court correctly stated, "to hold that any forfeiture or suspension of benefits is permissible so long as it is sanctioned by the [pension] plan is to turn [ERISA's] entire statutory scheme upon its head." *Utility Workers Union* v. *Consumers Power, supra,* 453 F. Supp. at 452. (We note that the district court also stated that its prior decision in *Carlson, supra,* had "resulted from excessive attention to the phrase 'under the plan' found in the definitional section of ERISA. . . ." *Id.* at 452, n. 8.) If this Court were to accept the reasoning of defendants, a company could legitimize any forfeiture of vested pension benefits simply by including the forfeiture into its pension plan's computation procedures. Such result, however, would be contrary both to the provisions and to the spirit of ERISA. For example, it has been held that

ERISA proscribes the forfeiture of an employee's vested pension benefits when the employee, upon separation from service, engages in employment that is competitive with his former contributing employer. *See, e.g., Keller* v. *Graphic Systems of Akron, Inc.*, 422 F. Supp. 1005, 1008 (N.D. Ohio 1976). In light of the illegal nature of such forfeiture for competitive employment, an employer cannot legitimize the forfeiture merely by providing in a pension plan that the benefit reduction is a computational adjustment of the plan's benefit level.

On the other hand, this Court acknowledges that not every reduction in pension benefits is prohibited by the non-forfeitability requirement of section 203. To the contrary, Congress has specifically sanctioned the practice of offsetting pension benefits by the amount that a pensioner receives in social security benefits. In establishing standards for qualified pension trusts in the Internal Revenue Code, 26 U.S.C. § 401(a)(15)(A), Congress provided that,

> A trust shall not constitute a qualified trust under this section unless under the plan of which such trust is a part, in the case of a participant or beneficiary who is receiving benefits under such plan . . . such benefits are not decreased by reason of any increase in the benefit levels payable under Title II of the Social Security Act . . . .

By prohibiting a pension benefit offset for any *increase* in social security payments, Congress implicitly approved the longstanding practice of offsetting pension benefits by the amount of social security payments that a participant receives at the time of his retirement. (We note that 26 U.S.C. § 401(a)(15)(A) has a counterpart in ERISA itself, 29 U.S.C. § 1056(b)(1).) Thus, certain offsets (*i.e.*, offsets that are comparable to an offset for social security payments) are reductions in benefits that do not violate the vesting requirements of section 203.

In view of the above statutory provisions, the crux of the present appeal may be framed in the following terms: Is the workers' compensation offset that is provided in the Consumers Power Pension Plan in the nature of an offset for social security payments – an offset that Congress implicitly sanctioned in the provisions of ERISA – or is the workers' compensation offset a forfeiture that is prohibited by the broad non-forfeitability language of section 203(a)? In addressing this question, we note that Congress included in ERISA only limited exceptions to the general non-forfeitability requirement of section 203. (These exceptions are found in 29 U.S.C. § 1053 (a)(3), and none are applicable in the present case.[2]) Further, we note that the requirement of non-forfeitability is one of the essential elements of ERISA's pension reform plan. When Congress enacted ERISA, it was concerned about employees who, after years of service to their employers, were denied pension benefits on account of their pension plan's restrictive vesting requirements. In the Act, Congress intended to provide these employees with guarantees that, after they had completed certain required years of service, they would gain unconditional and non-forfeitable rights to fixed pension benefits. Accordingly, Congress incorporated into section 203 of ERISA a broad proscription against forfeitures, and it drew only a few limited exceptions to the statutory provision. The House Committee, for example, in its comments on section 203, stated unequivocally that "with the limited exceptions noted [in 29 U.S.C. § 1053(a)(3)], no rights once they are required to be vested may be lost by the employee under any circumstance. . . ." H. Rept. 93-807, 1974 U.S. Code Cong. & Admin. News, pp. 4725-6. In light of the broad non-forfeitability language of section 203, and in light of the legislative history that underlies that section, this Court will carefully scrutinize any offset or reduction in pension benefits in order to determine if the offset or reduction is a forfeiture that is prohibited by ERISA.

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[2] *See* fn. 1, *supra*.

There is a final aspect of ERISA's statutory scheme that this Court is required to address in resolving the present appeal — namely, the regulations and rulings that have been issued by the Treasury Department on the subject of workers' compensation offsets over the past twenty-five years. In 1956, the Treasury Department issued Regulation § 1.401-4(b). That regulation pertains to section 401(a) of the IRC, 26 U.S.C. § 401(a), and to the standards set out therein that must be met by pension plans in order to qualify for favorable tax treatment. In this regulation, the Treasury Department stated that "the total benefits resulting under [a qualified pension] plan and under such [federal or state] law [must] establish an integrated and correlated retirement system satisfying the tests of section 401(a)." In other words, in the regulation, the Treasury Department recognized that pension benefits paid to a retiree may be offset by benefits provided under federal or state law, as long as the total benefits under the plan constitute "an integrated and correlated retirement system." In 1968, 1969 and 1978, the Treasury Department interpreted Regulation § 1.401-4(b), as it pertains to section 401(a), in the specific context of workers' compensation offsets. In the revenue rulings issued in these years, the Treasury Department reasoned that an offset for workers' compensation benefits was acceptable for purposes of section 401(a) because the total benefit package provided after such offset constituted "an integrated and correlated retirement system," as required by Regulation § 1.401-4(b). See Rev. Rul. 68-243, 1968-1 C.B. 157; Rev. Rul. 69-421, 1969-2 C.B. 59; Rev. Rul. 78-178, 1978-20 I.R.B. 9. As an example of its reasoning, the Treasury Department stated in Rev. Rul. 69-421, 1969-2 C.B. 59, at page 72, the following:

> . . . Benefits provided under a pension, annuity, profit-sharing, or stock bonus plan may be integrated with those provided under a state or Federal program that, like the social security program, requires employer contributions and makes benefits available to the general public. Thus,

> benefits payable under a state workmen's compensation law or an occupational diseases law may be an acceptable offset against benefits payable under a qualified plan. However, benefits payable under a qualified plan may not be offset by disability damages recovered by an employee in a common law action against the employer. See Rev. Rul. 68-243, C.B. 1968-1, 157.

In 1977, the Treasury Department adopted Regulation § 1.411 (a)-4(a) – a regulation that interprets the vesting and nonforfeitability provisions of section 411 of the IRC, 26 U.S.C. § 411. That regulation reads, in part, as follows:

> For purposes of Section 411 of the Code and the regulations thereunder, a right to an accrued benefit is considered to be nonforfeitable [or vested] at a particular time if, at that time and thereafter, it is an unconditional right.

The regulation continues:

> Furthermore, *nonforfeitable rights are not considered to be forfeitable* by reason of the fact that *they may be reduced to take into account benefits which are provided* under the Social Security Act or *under any other Federal or State law* and which are taken into account in determining plan benefits. [Emphasis supplied.]

Defendants herein rely heavily on the above regulations and rulings of the Treasury Department. This Court finds itself in agreement with the terms of the two regulations cited above. In essence, in Regulation § 1.401-4(b) and Regulation § 1.411(a)-4(a), the Treasury Department recognizes the validity of offsets for benefits provided under federal or state law, as long as the benefits that are offset are a part of "an integrated and correlated retirement system." We agree with this principle; however, we disagree with the Department's application of the principle in its various revenue rulings. The Department specifically addressed the issue of workers'

compensation offsets only in the revenue rulings cited above. Therein, the Department concluded that workers' compensation benefits are benefits that are a part of "an integrated and correlated retirement system." It is with this specific conclusion of the Treasury Department, found only in its revenue rulings, that this Court takes exception.

PRELIMINARY QUESTIONS

Before we examine in detail the nature of workers' compensation benefits, we must address preliminary questions that have been raised by the parties on appeal. First, plaintiffs and defendants dispute at considerable length the question of whether or not the workers' compensation offset of the Consumers Power Pension Plan was the subject of free collective bargaining. This question, no matter how it is resolved, is irrelevant. Even assuming that a challenged offset has been the subject of collective bargaining, ERISA voids all private contractual arrangements in violation of its provisions. Under the terms of ERISA, employees may seek redress for an illegal forfeiture of benefits, despite the fact that their union has consented to the forfeiture in the collective bargaining process.

Second, plaintiffs and defendants dispute what weight this Court should accord the various Treasury regulations and rulings cited above. In the recent case of *General Motors* v. *Buha*, — F.2d — (6th Cir. 1980), this Circuit held that Treasury Regulation § 1.401(a)-13 was a legislative rather than an interpretative regulation, and that as such the regulation was entitled to considerable deference by the judiciary. (Regulation § 1.401(a)-13 was issued pursuant to the authority of 29 U.S.C. § 1202(c), the section that is the authoritative basis for Treasury Regulation § 1.401-4(6) and § 1.411 (a)-4(a), *supra.*) *See also Baker* v. *Otis Elevator*, 609 F.2d 686 (3rd Cir. 1979). We note first that in the present case this Court is in disagreement only with the revenue rulings of

the Treasury Department (Rev. Rul. 68-243, 1968-1 C.B. 157; Rev. Rul. 69-421, 1969-2 C.B. 59; Rev. Rul. 78-178, 1978-20 I.R.B. 9), and not with the two Treasury regulations cited above. We further note that all Treasury interpretations, legislative or otherwise, must be set aside if in the interpretation "the Secretary has exceeded his statutory authority, or if the interpretation is 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.'" *Batterson* v. *Francis*, 432 U.S. 416, 426 (1977). In our opinion, the above-cited revenue rulings of the Treasury Department are at odds both with the statutory language of ERISA and with its legislative history.

Finally, defendants argue that Congress was aware of those Treasury Department rulings that concluded that workers' compensation offsets were allowable under the provisions of ERISA. *See, e.g., Hearings before the Subcommittee on Labor of the Committee on Labor and Public Welfare*, U.S. Senate, 92nd Cong., 2nd Sess., on Retirement Income Security for Employees Act, 1972, June 28 and 29, 1972, Part 3, pp. 997-980. In light of this, defendants conclude that Congress' failure to change the relevant statutory language of ERISA was an implicit approval of the Treasury Department interpretations. We point out that the pre-ERISA interpretations of the Treasury Department to which defendants refer pertained only to section 401(a) of the IRC – the "discrimination" section of the Code and not to those sections of the Code that relate to vesting and forfeitability under ERISA. Based in part on this fact, we conclude that these Treasury Department interpretations were not of such a longstanding nature or of such obviousness that Congressional failure to change ERISA's statutory language was tantamount to acquiescence in the administrative practice. *See Helvering* v. *Winmill*, 305 U.S. 79 (1938).

NATURE OF WORKERS' COMPENSATION BENEFITS

We now return to the central question presented on appeal: Are workers' compensation benefits and social security benefits "like" benefits for purposes of ERISA? (As indicated above, Congress has implicitly approved offsets for social security benefits in 26 U.S.C. § 401(a)(15)(A), *supra*. Thus, we assume that if workers' compensation benefits and social security benefits are "like" benefits, an offset for compensation benefits will also comport with ERISA's provisions.) This question may be rephrased to use the language of the Treasury Department: Are pension benefits, social security benefits, and workers' compensation benefits all a part of "an integrated and correlated retirement system," so that any one of the benefits may be used to offset the other under the provisions of ERISA? *See* Regulation § 1.401-4(b), *supra*.

The parties on appeal and the numerous *amici* have proposed several systems by which we can compare pension benefits, social security benefits and workers' compensation benefits. One such system is based on the so-called "common fund" doctrine. According to this doctrine, pension benefits, social security benefits and workers' compensation benefits are all like benefits because they spring from the same fund (*i.e.*, they are all paid, at least in part, by the employer). This is obviously a self-serving argument for the employer, and we find it to be of little use in the present context. The fact that an employer incurs multiple liabilities, or pays multiple benefits to an employee does not, in and of itself, make all such liabilities or benefits comparable. This "common fund" doctrine may find some support in revenue rulings such as Rev. Rul. 68-243, 1968-1 C.B. 157. Therein, the Treasury Department stated:

> The effect of section 401(a)(5) of the Code is to permit total [retirement] benefits, inclusive of those provided under the social security or similar program, to be used for comparative purposes. . . . A program, like the social

> security program, that requires employer contributions and makes benefits available to the general public is a similar program . . . .
>
> Since the benefits payable under a workmen's compensation law or occupational diseases law are available to the general public, it is held that benefits payable under such laws are acceptable as an offset against benefits payable under the qualified pension plan in the instant case. However, benefits under the plan may not be offset by disability damages recovered by an employee in a common law action against the employer.

However, we first of all question the correctness of the Treasury Department's conclusion that benefits payable under the workers' compensation law are benefits that are available to the "general public." Benefits payable under a typical workers' compensation statute are available only to a subclass of employees who have sustained a work disability (other than a normal age disability) within the course of their employment. In other words, workers' compensation benefits, unlike social security benefits and pension benefits, are available only to those employees who have fallen victim to certain unexpected disabilities. Moreover, we find that the factors set out in Rev. Rul. 68-243, *supra* – the funding of the program through employer contributions, and the availability of benefits to the general public – are merely superficial aspects of the various programs that we now consider. We find that these factors do not shed any light on the fundamental nature of pension benefits, social security benefits and workers' compensation benefits, so as to aid in a determination of whether these benefits all fit within "an interated and correlated retirement system," as required by Regulation § 1.401-4(b), *supra*.

There is a second and more substantive system that defendants recommend for use in comparing workers' compensation benefits with pension and social security benefits. This system is based on what we will call the "ultimate purpose" doc-

trine. Defendants argue that workers' compensation benefits, social security benefits, and pension benefits are all like benefits, because each is intended to provide "wage loss protection" when an employee is required to retire for a reason such as age, injury, or lack of work. In support of this argument, defendants cite state case law and academic treatises that indicate that workers' compensation is no longer a tort remedy, but is now a system of wage loss protection. *See, e.g., Fielder* v. *Travelers Insurance Co.*, 79 Mich. App. 449, 263 N.W. 2d 9 (1977); *Mazor* v. *State of Maryland*, 279 Md. 355, 369 A.2d 82 (1977); 4 *Larson, Workmen's Compensation Law*, § 97.51. Plaintiffs forcefully dispute this contention that workers' compensation is designed exclusively to provide wage loss protection, and they appear to view a concession on this point as fatal to their position. Further, the district court herein was careful not to hold that workers' compensation is simply in the nature of wage replacement. Judge Pratt reasoned as follows:

> In Michigan, workmen's compensation is a comprehensive replacement of the traditional tort remedies and their attendant common-law defenses. *Cruz* v. *Chevrolet Grey Iron Div., General Motors Corp.*, 398 Mich. 117 (1976) (Opinion of Coleman, J.); *Sims* v. *R. D. Brooks, Inc.*, 389 Mich. 91 (1973). See MCLA §§ 418.131, 418.141. That this system has compensatory elements beyond mere wage replacement is evident in MCLA § 418.357 which provides for up to 50% reductions in benefits paid to persons between their 65th and 75th birthdays. Despite the relatively few individuals who can be expected to earn income during these years, the legislature has provided continued benefits for them, presumably to compensate them, at least partially, for the added burden of their occupationally acquired disability.

We tend to agree with this reasoning of Judge Pratt. However, we do not agree that defendants will necessarily prevail in this appeal if we accept the position that workers' compen-

sation benefits are merely a part of a wage replacement system. The fact that various benefits serve the same ultimate purpose necessarily does not render all of them like benefits, in terms of ERISA. For example, when an employee leaves his employer and begins work at a competitor's business, the employee may gain rights to pension benefits under the pension plan of the competitor. These new pension benefits serve the purpose of wage loss protection; yet if they are offset against the pension benefits that the employee has earned at his former employer's, the offset is an illegal forfeiture under the terms of ERISA. *See Keller* v. *Graphic Systems of Akron, Inc., supra,* (forfeitures for competitive employment violate the non-forfeitability provisions of ERISA). Likewise, an employee may take out a private insurance policy to provide him with wage loss protection on the occurrence of a disabling injury. These insurance benefits also serve the purpose of wage loss protection; however, under ERISA, these benefits could not be used to reduce the employee's pension benefits under the pension plan of his employer.

We conclude that retirement benefits are like benefits for purposes of ERISA only when the "source of their entitlement" is the same. Pension benefits and social security benefits, regardless of the event that triggers their payment (*e.g.*, age or injury), are earned on account of the years of service that the employee-beneficiary has completed. In short, the years of service are the element that gives the employee the basic entitlement to the benefits. Congress focused on this fact in ERISA. When an employee devotes a substantial portion of his working life to his employer, ERISA guarantees the employee an unconditional right to pension benefits. In other words, ERISA reflects the fact that pension benefits are in the nature of deferred compensation that the employee has earned for the years of service that he has provided his employer. When Congress defined the term "non-forfeitable" in ERISA, it used the following language:

> [T]he term "nonforfeitable" when used with respect to a pension benefit or right means a claim obtained by a participant or his beneficiary to that part of an immediate or deferred benefit under a pension plan *which arises from the participant's service.* . . .

29 U.S.C. § 1002(19) (emphasis added). The same source of entitlement, then, is the factor that makes retirement benefits like benefits for purposes of ERISA. In other words, retirement benefits that have the same source of entitlement are all a part of "an integrated and correlated retirement system," and these benefits may be offset against each other in accordance with ERISA's provisions. *See* Regulation § 1.401-4(b), *supra.*

In conclusion, pension benefits and social security benefits are like benefits because they are both earned on account of the years of service that an employee has completed. Workers' compensation benefits, on the other hand, are not comparable in this regard. For purposes of workers' compensation law, it is irrelevant whether an employee has been at work for twenty years, ten years, five years, or one day. Workers' compensation benefits are paid solely because an employee has sustained an occupational injury within the course of his employment. Such injury is not only the event that triggers the payment of workers' compensation benefits; it is the sole source of the employee's entitlement to these benefits. Accordingly, the reduction of pension benefits by the amount that an employee receives in workers' compensation benefits is not an offset that is in the nature of an offset for social security payments. That is, workers' compensation benefits are not a part of "an integrated and correlated retirement system" that properly includes pension benefits and social security benefits. To the contrary, the reduction of pension benefits by the amount that an employee receives in workers' compensation benefits is an illegal forfeiture that is prohibited by the non-forfeitability provision of section 203(a) of ERISA, 29 U.S.C. § 1053(a).

CONCLUSION

Judge Pratt characterized the present case as "a tortuous struggle of inference and counter-inference drawn from a highly specialized statute and its attendant legislative history." Yet, at the same time, Judge Pratt recognized that the case touches upon human situations. This recognition is entirely consistent with the provisions of ERISA and its legislative history. ERISA was designed to eliminate the human abuses that were imposed upon employees as a result of the unfair deprivation of their pension benefits.

In this context, we make the following observations and pose the following hypotheticals. Assume that two workers, who have earned comparable wages and who have completed comparable years of service, retire. The one worker is healthy and he retires because he has reached normal retirement age. The other worker retires because he has suffered a severe work-related injury that renders him totally disabled. The injured worker receives workers' compensation benefits; however, his total benefit package remains the same because his pension benefits are reduced by his workers' compensation benefits. The healthy worker, on the other hand, receives the identical benefit package, but remains free and able to supplement his pension benefits by post-retirement work. As another example, assume that a worker who is eligible for pension benefits is totally disabled in a work-related accident. If the worker receives workers' compensation benefits, he will experience a dollar-for-dollar reduction in his pension benefits. Why should this worker file an action under a workers' compensation statute? In their brief, defendants provide an answer to this question. They point out that it is preferable from a tax point of view to receive workers' compensation benefits as opposed to pension benefits. To be kind, we find defendants' answer to be unpersuasive.

The above hypotheticals are typical of real-life situations that would occur if defendants' position on appeal were accepted by this Court. Yet, these situations are the very ones

that ERISA sought to eliminate. They call to mind the specialized and technical legal terms that are applicable in this case – "chilling of the right to bring a workers' compensation suit," "a penalty," "a forfeiture." Judge Pratt depicted the human element in the case in the following cogent terms:

> Pensions, in contrast, represent deferred income, or other benefits foregone by the worker in hopes of a more secure retirement. See, e.g., *Mosley* v. *National Maritime Union Pension and Welfare Plan, supra.* A pension plan participant must labor for the employer for a period of time before acquiring vested benefits. Upon attainment of retirement age, he or she is entitled to the agreed-upon payments. A retiree receiving pension benefits who does not have a compensable disability is in a far different position than a retiree who has, for example, lost a limb. To hold as defendants contend, that each of these two hypothetical individuals is meant to receive the same post-retirement compensation is excessively short-sighted. A person who has lost his leg has suffered a greater disruption of his life than merely diminution of his earning capacity. If the Court were to accept the defendants' argument, both the healthy and the maimed retirees would receive the same post-retirement income even though the burdens on the two are clearly disparate.

We find Judge Pratt's reasoning to be accurate and persuasive. We affirm the district court's grant of summary judgment in favor of plaintiffs, for the reasons stated above.

Appendix A

ENGEL, Circuit Judge, dissenting. I respectfully dissent. I find more persuassive the opinion of Judge Garth in *Buczynski* v. *General Motors Corp.*, 616 F.2d 1238 (3rd Cir. 1980), *cert. granted*, 49 U.S.L.W. 3322 (Nov. 3, 1980). In *Buczynski* Judge Garth makes an extensive review of the legislative history of ERISA and concludes that Congress gave its implicit approval to the prior IRS practice of allowing offsets for workers' compensation benefits. Given the breadth of the Social Security program, Judge Garth also concludes that Congress approved offsets for disability benefits.

In my opinion, the result reached by the majority's construction of ERISA is inflexible, and is at odds with the statutory and regulatory scheme. The plain language of the pension plan for the employees of Consumers Power Company, which the union now seeks to repudiate, is not inconsistent with the provisions of ERISA, but on the contrary is consistent with the eligibility requirements under the Internal Revenue Code, 26 U.S.C. § 401(a)(15)(A) (1976), and with its counterpart in ERISA, 29 U.S.C. § 1056(b)(1) (1976). Both our circuit, in *General Motors Corp.* v. *Buha*, 623 F.2d 455 (6th Cir. 1980), and the Third Circuit in *Baker* v. *Otis Elevator*, 609 F.2d 686 (3rd Cir. 1979), have recognized that Treasury Regulation § 1.401(a)-13 is a legislative rather than an interpretative regulation and as such is entitled to considerable deference by the judiciary. That regulation provides in part:

> Furthermore, non-forfeitable rights are not considered to be forfeitable by reason of the fact that they may be reduced to take into account benefits which are provided under the Social Security Act or under any other federal or state law and which are taken into account in determining planned benefits.

The majority, which states that it "finds itself in agreement" with the terms of the cited regulation, nonetheless holds that the regulation is not applicable to state laws providing for workmen's compensation benefits. In support thereof it asserts

that it is not bound by the revenue rulings of the Treasury Department, which more particularly recognize that workmen's compensation law and occupational disease law, being available to the general public, are acceptable as an offset against benefits payable under a qualified pension plan. *See Revenue Ruling* 67-243 (1968) – 1 C.B. 157.

While I readily recognize that a Treasury Department Revenue Ruling does not have the force of the regulation, it is in my opinion entirely consistent with the regulation itself and with the overall statutory scheme. It is true that workmen's compensation laws partake both of "wage loss protection" as well as an historic remedy in tort. While admittedly the issue is not without difficulty, in my opinion the majority opinion fails to refute the reasoning of Judge Garth and his recognition that workmen's compensation is in very real measure much like social security in the breadth of its coverage. *See Buczynski* v. *General Motors Corp., supra,* 616 F.2d at 1246-47.

In my opinion, the district court and the majority here appear overly concerned with the potential impact which the receipt of workmen's compensation benefits will have upon non-forfeitability where those benefits are to be received even after normal retirement age. While this is, in a sense, true, it is no more true in the case of workmen's compensation than it is with social security, and thus in my opinion it is not inconsistent with the intent of the statutory scheme. It would seem to me that the litigants ought to be as much concerned with the very direct threat to the stability of the pension plan itself by the impact of the majority's decision upon the integrity of the fund and its capability for providing real benefits to the workers at Consumers Power upon their retirement. The temporary benefits which a few may gain by the benefit of this "double dipping" must inevitably be offset by the economic realities that in the future the impact is bound to be felt in the financial weakening of an otherwise sound pension system. ERISA is a most useful addition to the body of

American law which is designed to protect the working man against forfeiture of pension rights. The interpretation given the Act by the Third Circuit is, in my opinion, to be preferred because it retains flexibility, avoids potential abuse, while fully protecting the objective of the Act in assuring income protection in a variety of circumstances.

APPENDIX B

Order of the United States Court of Appeals for the Sixth Circuit in *Utility Workers of America* v. *Consumer Power Company* of February 3, 1981

(Filed—February 3, 1891)

No. 78-1402

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UTILITY WORKERS UNION OF AMERICA, AFL-CIO, *et al.*,

Plaintiffs-Appellees,

v.

CONSUMERS POWER COMPANY, *et al.*,

Defendants-Appellants.

The opinion decided and filed in the above cause on January 6, 1981 is amended as follows:

On page 1, "Engle" is changed to "Engel".

On page 3, the citation to Buczynski v. General Motors Corporation is changed to read "*Buczynski* v. *General Motors Corporation,* 616 F.2d 1238 (3rd Cir.), cert. granted 49 USLW 3322 (Nov. 3, 1980)."

ENTERED PURSUANT TO RULE 4(f),
RULES OF THE SIXTH CIRCUIT
JOHN P. HEHMAN, Clerk

APPENDIX C

Opinion of the United States District Court for the District of Hawaii in *The Employee Benefits Committee of the Retirement System of Hawaiian Telephone Company* v. *Eleanor Pascoe, et al.*, No. 78-0483 (District of Hawaii December 15, 1980)

THE BUREAU OF NATIONAL AFFAIRS, INC.

THE UNITED STATES LAW WEEK, WASHINGTON, D. C.

Date Filed: 12-15-80

Date Received: 12-23

THE EMPLOYEE BENEFITS COMMITTEE OF THE RETIREMENT SYSTEM OF HAWAIIAN TELEPHONE COMPANY, and HAWAIIAN TELEPHONE COMPANY,

Plaintiffs,

v.

ELEANOR PASCOE, EDWARD YOUNG, EDMUND LIN, FRANK YEE, CORNELIO KAAI, JAMES JEREMIAH, and LOCAL 1357, IBEW,

Defendants.

Civil No. 78-0483

United States District Court

Dist. of Hawaii

Dec. 15, 1980

Appendix C

Before:

HONORABLE SAMUEL P. KING

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MEMORANDUM AND ORDER

This action was brought under section 502 of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1132 (1975), by the Employee Benefits Committee of the Retirement System of Hawaiian Telephone Company ("committee") and Hawaiian Telephone Company ("company"). Plaintiffs seek a declaratory judgment confirming their right to offset benefits received by defendants under the Hawaii Workers' Compensation

* Now Associate Justice, Supreme Court of Hawaii.

Law, Hawaii Rev. Stat. §§ 386-1 to 386-142 (1976), against benefits due defendants under the Retirement System of Hawaiian Telephone, the company pension plan ("plan").[1] Plaintiffs also seek return of a lump sum allegedly overpaid to defendant Pascoe and an alleged overpayment to defendant Jeremiah due to an increase in Jeremiah's workers' compensation benefit. Section 502, subsections (3)(1) and (f), confers jurisdiction on this Court to decide matters brought pursuant to the Act.

The case is before this Court on cross motions for summary judgment. No material issues of fact remain in dispute.

Each of the defendants is covered by the plan and is receiving or has received in a lump sum benefits under the plan. Each of the defendants has received or is receiving his own contributions to the plan. These are not at issue here. At issue is the right of plaintiffs to apply the plan's "offset" provision, found in art. VI, par. 7, of the 1976 revision of the plan and section 3, subsection 11, of the 1973 revision of the plan and which reads:

> Any amounts paid or payable by the Company or as the result of premiums or taxes paid therefore by the Company, under the provisions of the Hawaii Workers' Compensation Law or any similar law, to an employee or Retired employee or to his dependents on account of his service, any Disability or death shall be offset against and payable in lieu of any benefits payable out of funds provided from

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[1] The plan is administered by the company through the committee which consists of three to five members who are appointed by and serve at the pleasure of the Board of Directors of the company.

contributions of the Company under the provisions of this System on account of the same service, Disability or death. In case the present value of the total commuted benefits under the Hawaii Workers' Compensation Law or any similar law is less than the present value of any benefits otherwise payable from funds provided from contributions of the Company under the provisions of the System, then the present value of the commuted payments under the Hawaii Workers' Compensation Law or any similar law shall be deducted from the present value of these benefits and such benefits as may be provided by the remainder shall be payable under the provisions of these Rules.

1. FACTS

a. *Eleanor Pascoe*

Charles Pascoe, a long-time employee of the company, suffered a heart attack on June 8, 1974, that resulted in his death on June 18, 1974, at the age of 52. Pursuant to a provision of the plan, Charles Pascoe's widow, Eleanor Pascoe, received on July 11, 1974, a lump sum payment of $12,655.00 as a return of her husband's employee contributions to the plan, plus interest. She also received a second lump sum payment of $30,277.28 as an accidental death benefit derived from the company's contributions to the plan.

Mrs. Pascoe was subsequently awarded workers' compensation dependency benefits by the Director of Labor and Industrial Relations, State of Hawaii, on March 24, 1976. The company and the insurance carrier responsible

for payment of the award appealed the decision to the Labor and Industrial Relations Appeal Board.[2] The only issue litigated on appeal was whether the company should be permitted to offset the accidental death benefits paid under its pension plan against the awarded compensation. Citing the "strong policy expressed in Chapter 386 (of the Hawaii Revised Statutes) against the diminution or cancellation of compensation liability through any means," the Appeals Board denied the company's appeal.[3]

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[2] The Board is the state agency delegated the power to determine appeals from initial workers' compensation decisions. Hawaii Rev. Stat. § 386-87 (1967). Judicial review of decisions of the Board lies only in the Supreme Court of Hawaii, Hawaii Rev. Stat. § 386-88 (1976).

The appeal in the *Pascoe* case was prosecuted solely by the company.

[3] The Board cited the following sections of Chapter 386, Hawaii Revised Statutes, in support of the denial:

> § 386-9 Contracting out forbidden. Except as provided in § 386-78, no contract, rule, regulation or device whatsoever shall operate to relieve the employer in whole or in part from any liability created by this chapter;
>
> § 386-57 Legal status of right to compensation payments. (a) the right to compensation under this chapter shall not be assignable, and the right to compensation and compensation payments received shall be exempt from the reach of creditors;
>
> (b) The right to compensation under this chapter shall have the same status as a lien or the same priority for the whole thereof with respect to the assets of the employer as are accorded by law to any unpaid wages for labor; and

(Footnote continued on following page)

Though Mrs. Pascoe was awarded $35,100.00, her lump sum recovery and weekly benefits totalled only $22,601.79 due to termination of weekly benefits upon her remarriage on August 26, 1977. Defendants seek recovery of the $22,601.79 as an offset against the plan benefits she collected. Mrs. Pascoe is now a resident of the State of Tennessee.

b. *Edward Young*

On August 17, 1977, at age 61 and with more than 31 years of service, Edward Young chose to retire from the employ of the company because he was over the normal retirement age of 60 and had sustained a permanent disability. Young elected to withdraw his accumulated employee contributions and received them, with interest, in a lump sum payment of $4,206.04. Young was eligible to receive a Service Retirement Allowance under the plan, and elected to receive the benefit in the form of a single-life

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(Footnote continued from preceding page)

§ 386-129 Employees not to pay for insurance; penalty. No agreement by an employee to pay any portion of the premium paid by his employer, or to contribute to a benefit fund or department maintained by the employer, or to the cost of mutual or other insurance maintained for or carried for the purpose of securing compensation as herein required, shall be valid; and any employer who makes a deduction for that purpose from the wages or salary of any employee entitled to the benefits of this chapter shall be fined not more than $250.

Deps. of Charles Pascoe, Dec'd. v. *Hawaiian Telephone Co.*, Case No. AB-76-86, Decision and Order, Labor and Industrial Relations Appeals Board, State of Hawaii, March 15, 1977.

annuity payable at $120.93 per month. Subsequently, he was awarded temporary total disability benefits under workers' compensation in the amount of $167.00 per week. The company, through the committee, applied the offset provision and terminated payment of pension benefits when workers' compensation benefits commenced because the workers' compensation benefits exceeded what he was entitled to receive in pension benefits. Plaintiffs seek a declaratory judgment on the validity of the offset provision and their application of it to Young.

c. *Edmund Lin*

On September 1, 1977, at age 53 and after seven years of service, Edmund Lin was terminated from employment of the company because of a permanent disability. Lin was terminated by unilateral action of the company as provided for in the plan.[4] He elected to withdraw his employee contributions and received them, with interest, in a lump sum payment of $700.68. Lin elected also to receive an Accidental Disability Retirement Benefit ("disability benefit") in the form of a 100% joint and survivor annuity payable for his life and that of his surviving spouse at the rate of $239.56 per month. Subsequently, he was awarded temporary total disability benefits under the workers' compensation law in the amount of $90.93 per week. Because the temporary compensation benefits exceeded the pension entitlement, the company terminated the payment of pension benefits upon commencement of payment of workers'

[4] Despite its termination of Lin based on permanent disability, the company contended at the workers' compensation hearing that Lin was not totally disabled for work and in fact had suffered only a minimal permanent partial disability.

compensation benefits. Plaintiffs seek a declaratory judgment that this offset is valid.

d. *Frank Yee*

On September 10, 1977, at age 53 and with more than 25 years of service, Frank Yee was terminated by unilateral action of the company because of a permanent disability. Yee elected to withdraw his employee contributions and received them, with interest, in a lump sum payment of $11,769.76 . He was eligible to receive a disability benefit under the plan and received such benefit in the form of a single-life annuity payable at the rate of $799.95 per month. On September 13, 1977, Yee was awarded workers' compensation benefits of $112.50 per week payable by the employer up to a maximum liability of $35,100.00. An additional benefit of $112.50 per week payable out of the Special Compensation Fund[5] will commence if the maximum liability of the employer is reached and continue through the duration of his disability. The workers' compensation benefit of $112.50 per week is being offset against Yee's disability benefit so that he is receiving the balance of $290.45 per month from the plan. Plaintiffs seek a declaratory judgment that this offset is valid.

e. *Cornelio Kaai*

On December 1, 1977, at age 52 and with seven years of service, Cornelio Kaai was unilaterally terminated by the

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[5] The special compensation fund, established and maintained under the workers' compensation law, Hawaii Rev. Stat. § 386-151, is funded by contributions made by employers as required by other provisions of the law.

company because of a permanent disability[6] and elected to allow his employee contributions to remain in the plan, thereby increasing any pension benefit payable to him. Kaai was eligible to receive a disability benefit and elected to receive it in the form of a 50% joint and survivor annuity payable for his life at the rate of $463.01 per month, of which $452.42 would be attributable to employer contributions and $10.54 would be attributable to his own contributions, and for the life of his surviving spouse at the rate of $231.50 per month. On September 6, 1978, the Workers' Compensation Division awarded Kaai a benefit of $112.50 per week for the duration of his disability. Because that benefit exceeded the portion of the disability benefit attributable to employer contributions otherwise payable under the plan, the committee suspended payment of that portion until such time, if ever, as the payments from the plan exceed the workers' compensation award. Kaai is therefore only receiving the $10.59 per month attributable to his own contributions. The benefits Kaai is receiving are temporary total disability benefits. Plaintiffs seek a declaratory judgment that this offset is valid.

f. *James Jeremiah*

On December 1, 1977, at age 55 and with 34 years service, James Jeremiah was terminated by unilateral action of the company because of a permanent disability. Jeremiah elected to allow his employee contributions to remain in the plan, thereby increasing the pension payable to him. He was also eligible to receive a disability benefit and

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[6] The company contended at the workers' compensation hearing that Kaai was not permanently totally disabled for work.

elected to receive it in the form of a 50% joint and survivor annuity payable to him at the rate of $620.90 per month of which $511.16 would be attributable to employer contributions and $109.74 would be attributable to his contributions, and for the life of his surviving spouse at the rate of $310.45 per month.

Jeremiah initially was awarded workers' compensation benefits of $75.00 per week.[7] On March 8, 1978, the award was increased to $100.27 per week.[8] Neither the company nor the committee was aware of the increase. From Jeremiah's termination on December 1, 1977, through October 31, 1978, the $75.00 per week was set-off against Jeremiah's disability benefit and he received a balance of $295.50 per month from the plan. The plan is now offsetting the full workers' compensation benefit against the pension benefit and, along with declaratory relief, plaintiffs seek the return of an alleged total overpayment of $1,204.50 plus interest.[9]

Local 1357, International Brotherhood of Electrical Workers (IBEW) raised grievances on behalf of defendants Young, Lin, Yee, Kaai and Jeremiah alleging invalidity of the offset provision under ERISA. These griev-

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[7] The company contended at the workers' compensation hearing that Jeremiah was not permanently totally disabled for work.

[8] The company was ordered to pay weekly compensation of $100.27 for 90% of permanent total disability for 224.3941 weeks for a total of $22,500.00. Beginning July 7, 1979, the Special Compensation Fund paid $100.27 weekly for the duration of the disability.

[9] This sum is calculated by plaintiffs as an alleged overpayment of $109.50 per month for a total of eleven months.

ances still pending and awaiting the outcome of this declaratory action. No grievance was raised on behalf of Eleanor Pascoe since her husband was a supervisory employee not represented for collective bargaining purposes by the union. On August 1, 1977, plaintiffs filed *The Retirement System of Hawaiian Telephone* v. *Eleanor Pascoe,* Civil No. 52214, in the Circuit Court of the First Circuit, State of Hawaii, seeking the same relief sought here. After Pascoe filed motions to dismiss and/or for summary judgment, the parties stipulated to a dismissal without prejudice, apparently to allow the plaintiffs to file in federal court against the several defendants against whom offsets were being carried out.

2. Employee Retirement Income Security Act (ERISA)

Plaintiffs seek declaratory relief establishing that the offset provision is legal, binding upon defendants and other participants and beneficiaries under the plan, and that its enforcement is incumbent upon the committee as the fiduciary responsible for enforcing the plan. They claim that failure to carry out such offsets would injure the company by requiring it to increase its contributions beyond those contemplated by the company and the union during collective bargaining. For all defendants except Pascoe the company's claim is based on its assertion that the offset provision does not contravene section 203(a) of ERISA, 29 U.S.C. § 1053(a)(1975), which provides:

> Each pension plan shall provide that an employee's right to his normal retirement benefit is nonforfeitable upon the attainment of normal retirement age. . . .

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Section 203(a)(1) further provides that in order to satisfy the section, each pension plan must provide that ". . . an employee's rights in his accrued benefit derived from his own contributions are nonforfeitable." 29 U.S.C. § 1053 (a)(1)(1975). Section 203(a)(1) is not at issue here since all the defendants are receiving or have received their employee contributions.

A plan must satisfy paragraphs (1) *and* (2) under section 203(a). To satisfy paragraph (2), a plan must satisfy subparagraph (A), (B), or (C). The combination of provisions incorporated into a plan under section 203 (a)(1) and (2) constitute the minimum vesting standards for that plan. That is, in order to meet minimum vesting requirements, a plan must provide that an employee's right to his normal retirement benefit upon reaching normal retirement age is nonforfeitable (vested), and that an employee's right in his accrued benefit derived from his own contribution is nonforfeitable, and the plan also must provide one of the alternatives under subparagraphs (A), (B) or (C). The latter provision in a plan is commonly referred to as alternative vesting. The plan here incorporated subparagraph (A). That provision reads:

> (A) A plan satisfies the requirements of this subparagraph if an employee who has at least 10 years of service has a nonforfeitable right to 100 percent of his accrued benefit derived from employer contributions.

Plaintiffs base their contention that the offset does not contravene section 203(a) on section 401(a)(5) of the Internal Revenue Code, 26 U.S.C. § 401(a)(5) (1978), a provision that plaintiffs claim allows such an offset. Plaintiffs also rely on treasury regulations promulgated under section 401(a)(5).

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Defendants assert that the clear language of ERISA's minimum vesting and nonforfeiture provisions, prohibition against alienation of benefits, and express policy to protect the interests of participants and their beneficiaries by requiring vesting of accrued benefits show that the offset provision is void under ERISA. They argue that the label "offset" should not fog the true nature of this "forfeiture".

a. *ERISA Coverage*

Before taking up these arguments, it is necessary to examine the application of ERISA to the defendants. Plaintiffs concede that ERISA's nonforeiture provisions apply to all the defendants except Mrs. Pascoe. For plans in existence on January 1, 1974, ERISA provides for its application in cases of plan years beginning after December 31, 1975, 29 U.S.C. § 1061(b)(2) (1975). Since Charles Pascoe died and Eleanor Pascoe received her pension benefits in 1974, ERISA, but its terms, does not apply to her benefits, *Keller* v. *Graphic System of Akron, Inc.*, 422 F. Supp. 1005, 1008-1009 (N.D.Ohio 1976); *Martin* v. *Bankers Trust Co.*, 417 F. Supp. 923, 925-926 (W.D. Va. 1976); *Barcelona* v. *Fox Grocery Co. Emp. Pen. Plan*, 483 F. Supp. 1128, 1131 (W.D.Pa. 1980); *Fox* v. *Merrill Lynch & Co., Inc.*, 453 F. Supp. 561, 565-566 (S.D.N.Y. 1978); *Savoretti* v. *Hotel & Restaurant Emp. & Bartenders*, 470 F. Supp. 1286, 1290 (S.D.N.Y. 1979); *Schlansky* v. *United Merchants & Manufacturers, Inc.*, 443 F. Supp. 1054, 1063-1064 (S.D.N.Y. 1977). The gradual changes in rules governing pension plans under ERISA were carefully structured by Congress with a wide variety of effective dates, and the intent of Congress to give the law

only prospective application is clear, *Los Angeles Dept. of Water & Power* v. *Manhart,* 435 U.S. 702, 721-722, n. 40 (1977); *Nolan* v. *Meyer,* 520 F.2d 1276, 1278 (2d Cir. 1975). *See also Wilson* v. *Board of Trustees, Inc.,* 564 F.2d 1299, 1302 (9th Cir. 1977).

Defendants nevertheless claim that, though collection of benefits occurred in 1974, Mrs. Pascoe did not apply for and receive workers' compensation benefits until after January 1, 1976, the effective date of ERISA for this plan. They argue that the section 203 standards apply to the offset against Mrs. Pascoe's penson benefits and prohibit the forfeiture. Accepting this interpretation makes the answer turn on when Mrs. Pascoe received workers' compensation benefits rather than on the effective date of the plan and when her pension benefits were paid. Such a strained interpretation is directly contrary to the clear intent of Congress in establishing the effective dates for ERISA provisions. Defendants' claims based on forfeiture and minimum vesting under ERISA do not apply to the Pascoe situation.

b. *Nonforfeiture*

For circumstances similar to the instant one, other federal courts have taken various paths to decide whether similar offsets were or were not forfeitures under ERISA. A careful analysis of these cases leads this Court to conclude that a forfeiture has occurred here.

Under 29 U.S.C. § 1002(19):

> The term 'nonforfeitable' when used with respect to a pension benefit or right means a claim obtained by a participant of his beneficiary to that part of

> an immediate or deferred benefit under a pension plan which arises from the participant's service, which is unconditional, and which is legally enforceable against the plan. For purposes of this paragraph, a right to an accrued benefit derived from employer contributions shall not be treated as forfeitable merely because the plan contains a provision described in section 1053(a)(3) of this title.

The clear meaning of these words indicates that a forfeiture occurs whenever a company takes away the right to receive full benefits to which an employee is entitled under a plan.

The United States Supreme Court recently gave a broad interpretation to the nonforfeitability provision in ERISA in holding that vested benefits under a plan are nonforfeitable in spite of a plan provision that limited benefits to the amounts that could be provided from the assets of the fund. *Nachman Corp.* v. *Pension Ben. Guaranty Corp.*, 446 U.S. ——, 100 S.Ct. 1723 (1980). In referring to deprivation of benefits to employee due to termination of pension plans, the Court stated:

> Congress wanted to correct this condition by making sure that if a worker has been promised a defined pension benefit upon retirement—and if he has fulfilled whatever conditions are required to obtain a vested benefit—that he actually receive it.

Id. 100 S. Ct. at 1733. The legislative history of ERISA also supports a broad interpretation of the nonforfeitability language. For example, the House Conference Report indicates that "[U]nder the conference substitute, except as

outlined below, an employee's rights, once vested, are not to be forfeitable for any reason."[10]

Plaintiffs' argument that the offset does not constitute a forfeiture is based on two provisions in the Internal Revenue Code (IRC): (1) section 411 of the IRC, 26 U.S.C. § 411 (1978), and Treas. Reg. § 1.411(a)-4(a) promulgated under it and (2) section 401(a)(5) of the IRC, 26 U.S.C. § 401(a)(5) (1978). Plaintiffs contend that both of these provisions authorize such an offset and both are valid exercises of the power to make rules under ERISA.

Treas. Reg. § 1.411(a)-4(a) was promulgated under section 411 of the IRC, 26 U.S.C. § 411 (1978), and provides:

> Nonforfeitable rights are not considered to be forfeitable by reason of the fact that they may be reduced to take into account benefits which are provided under the Social Security Act or under any other Federal or State law and which are taken into account in determining plan benefits.[11]

Plaintiffs are clearly correct in their assertion that this regulation permits the workers' compensation offset in the plan. Since the language of ERISA indicates otherwise, as discussed *supra*, the question of the validity of the

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[10] H.R. Rep. No. 93-1280, 93d Cong., 1st Sess., *reprinted in* [1974] U.S. Code Cong. & Admin. News 5038, 5052. The exceptions referred to in the report, see note 14, *infra*, are unrelated to workers' compensation benefits.

[11] This regulation interprets the minimum vesting standards section of the IRC but was made applicable to the minimum vesting standards provision of ERISA through § 3002(c) of ERISA, 29 U.S.C. § 1202(c) (1975).

regulation arises. Its validity has split other courts considering the forfeiture issue. Two cases decided in opposite ways in the same district illustrate the problem.

In *Utility Workers Union of America* v. *Consumers Power Co.*, 453 F. Supp. 477 (E.D.Mich. 1978), the court held that the offset of workers' compensation benefits constituted a prohibited forfeiture under ERISA. In doing so, the court gave little or no weight to Treas. Reg. § 1.411 (a)-4(a) since it was not convinced that the Secretary of the Treasury had been given authority to make final interpretations of ERISA or that the practice of allowing such offsets was either long-standing or of such obviousness that failure by Congress to override it in some way indicated an acquiescence by Congress. In *Bordine* v. *Evans Products Co.*, 453 F. Supp. 19 (E.D.Mich. 1978), the court concluded that such offsets were not prohibited forfeitures, relying in part on the regulation but without discussing its possible conflict with the statutory language.

In a more recent case, *Stong* v. *Bucyrus-Erie Co.*, 472 F. Supp. 1089 (E.D.Wis. 1979), the court held the regulation invalid as inconsistent with the language and intent of the statute. The court questioned whether congressional intent as to the ERISA forfeitability provision bears any relationship at all to the § 411 intent and concluded that the regulation impeded the congressional goal of nonforfeitability. The court stated:

> For they ask me to conclude that, in the course of enacting a comprehensive remedial statute for the protection of the rights of workers to their earned retirement benefits, benefits which are essentially deferred compensation for services rendered, Congress left a gaping hole in its handiwork, allow-

> ing these benefits to be reduced proportionately when a retired worker successfully asserts a workers' compensation claim. However, workers' compensation benefits are intended to compensate an employee for suffering a job-related injury and are not intended to supply retirement security.

Id. at 1093.

The court continued:

> I think it would be an unreasonable interpretation of ERISA and contrary to its spirit to conclude that Congress injected another trade-off into this intricate scheme, forcing an employee with a work-related injury to forego the relief provided by statute for such injury in order to preserve his retirement benefits. Clearly, the nonforfeitability rule, with its narrowly defined and carefully delimited exceptions, was aimed at precluding such a harsh dilemma.

Id. The court also noted that the Secretary of the Treasury, in a brief submitted to the court urging it to reject the *Utility Workers* result, stated that the *Utility Workers* court " 'gave too much weight to the statutory language. . . .' " In rejecting this reasoning, the court pointed out that the first duty of the court is to accord weight to the statutory language.[12]

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[12] On a motion for reconsideration of the court's ruling in *Stong*, Judge Gordon considered new arguments made by the Secretary of the Treasury in support of the treasury regulation. The court not only rejected these arguments but indicated that they served to reassure it of the correctness of its earlier position, *Stong* v. *Bucyrus-Erie Co.*, 481 F. Supp. 760 (E.D.Wis. 1979).

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In two other cases, United States district courts have invalidated Treas. Reg. § 1.411(a)-4(a) in holding that workers' compensation offsets constitute forfeitures under ERISA. *Buczynski* v. *General Motors Corp.*, 456 F. Supp. 867 (D.N.J. 1978) *aff'd on reconsideration* 464 F. Supp. 133 (D.N.J. 1978); *Alessi* v. *Raybestos-Manhatten, Inc.*, Civil Action No. 78-0434 (D.N.J. 1978). The reasoning of the *Buczynski* court was that the language in ERISA and its legislative history indicate that ". . . Congress expected that pension benefits would generally be nonforfeitable, and that employees would forfeit benefits only under narrowly defined circumstances." 464 F. Supp. at 136. Since the regulation did not assist in achieving that goal but rather impeded it, it was held to be inconsistent with the statute. The court started with the general proposition that forfeitures of pension benefits are prohibited under ERISA except as to narrowly defined exceptions. Since none of the exceptions even mention workers' compensation benefits, the court held that such an offset was prohibited. The legislative history of ERISA supports this interpretation. Congress declared that "an employee's rights, once vested, are [with certain exceptions] not to be forfeitable for any reason. . . ." H.R. Rep. No. 93-1280, 93d Cong., 1st Sess., *reprinted in* [1974] U.S. Code Cong. & Admin. News 5038, 5052.

The holdings in *Buczynski* and *Alessi* recently were reversed by the United States Court of Appeals for the Third Circuit in *Buczynski* v. *General Motors Corp.*, 616 F. 2d 1238 (3d Cir. 1980); *cert. granted* 49 U.S.L.W. 3332 (Nov. 4, 1980). In its analysis, the Third Circuit began with the regulation rather than the statute and, giving great deference to the regulation as a legislative rule, held it valid. Based on *Batterton* v. *Francis*, 432 U.S. 416

(1977) and its own earlier holding in *Baker* v. *Otis Elevator Co.*, 609 F.2d 686 (3d Cir. 1979), the court held that to sustain a legislative rule, "'we need only determine . . . that its promulgation is not an abuse of discretion, that it is neither arbitrary or [sic] capricious, not contrary to the governing statutory section and ERISA as a whole,' 609 F.2d at 692." 616 F. 2d at 1243. Despite the Third Circuit's interpretation and reversal of the district court holdings, it appears to this Court that the district courts did precisely what the circuit court said should be done. That is, they examined the language and legislative history of ERISA and found the regulation contrary to the governing statutory section and ERISA as a whole.

The Third Circuit placed great emphasis on the treatment of social security benefits under ERISA. It reasoned that when Congress enacted ERISA, the IRS had extensive previous experience in administration of pension plans as they relate to the tax laws. The IRS had promulgated regulations and issued rulings in its administration of the statutory requirement that pension plans be nondiscriminatory. Specifically, the IRS had a long-standing practice of allowing pension plan offsets for social security benefits but allowing offsets for any increase of social security benefits after a retiree began to receive his pension. Congress adopted and codified this administrative practice in ERISA at 26 U.S.C. § 401(a)(15)(1978). Accordingly, the court reasoned, Congress was giving tacit approval to other types of offsets. That is, by disapproving of offsets against social security benefit increases, Congress was approving of offsets against social security and other benefits in general. In light of the general prohibition against forfeitures under ERISA, it seems far more reasonable to assume that Congress, by disapproving of offsets against

social security increases, was approving of social security benefit offsets but not making a sweeping statement about offsets based on other kinds of benefits.

In reaching the same conclusion about forfeitures under ERISA, the court stated in *Riley* v. *MEBA Pension Trust*, 570 F.2d 406, 409 (2d Cir. 1977) *aff'd on rehearing* 586 F.2d 968 (2d Cir. 1978): "When § 203(a)(3)(B) provides that certain kinds of suspensions are not forfeitures, it necessarily implies that those not falling within its terms are." 570 F.2d at 409. *See also Keller* v. *Graphic Systems of Akron, Inc.*, 422 F. Supp. 1005, 1008 (N.D.Ohio 1976). Relying on the requirement that a nonforfeitable right be "unconditional and legally enforceable against the plan. . . .", 29 U.S.C. § 1002(19)(1975), Judge Friendly held in *Riley* that a pension plan that prohibited post-retirement employment in a related area placed a condition on the employee's right to receive benefits and constituted a prohibited forfeiture.[13] *See also Stong* v. *Bucyrus-Erie Co.*, 481 F. Supp. 760, 762 (E.D.Wis. 1979). Likewise, plaintiffs' characterization of the offset here indicates that they view an employee's right to receive full pension benefits as conditioned on his not receiving workers' compensation benefits.

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[13] Judge Friendly stated:

> . . . The provision . . . places a condition on Riley's claim to the monthly benefits to which he would otherwise be entitled and makes his claim legally unenforceable against the Plan; it thus constitutes a forfeiture within the meaning of ERISA. This is nonetheless true because, despite the contrary thrust of the language of the plan, the trustees are willing to pay the benefits if Riley quits his government job. 570 F.2d at 409.

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Section 401 of the IRC provides requirements for a trust for pension plan benefits to be a "qualified" trust for tax purposes. Section 401(a)(4), 26 U.S.C. § 401(a)(4) (1978), provides that such a trust may not discriminate as to contributions or benefits in favor of employees who are officers, shareholders, or highly compensated. Section 401 (a)(5) provides that a plan shall not be considered discriminatory under section 401(a)(4) because benefits to employees may ". . . differ because of any *retirement benefits* created under State or Federal law." 26 U.S.C. § 401 (a)(5) (1978). (emphasis added). Plaintiffs argue correctly that this provision indicates that at least some forfeitures are permitted under ERISA. That some forfeitures are permitted is clear under section 203 of ERISA itself, the provision under which some forfeitures are prohibited,[14] and under section 206 of ERISA, 29 U.S.C. § 1056 (b) (1975), the counterpart to section 401 of the IRC.[15]

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[14] Section 203(a)(3) of ERISA, 29 U.S.C. § 1053(a)(3) (1975), provides certain types of situations under which benefits can be forfeited without violating ERISA. These are benefits not payable because a participant dies (except in the case of a survivor annuity), benefits not payable because an employee is reemployed by the same company subsequent to the commencement of payment of benefits, benefits not payable because plan amendments may be given retroactive application as provided under another section of ERISA; and benefits not payable because a participant who is less than 50% vested chooses to withdraw any amount attributable to his own mandatory contributions.

[15] Section 206 provides:

> If—
>
> (1) a participant or beneficiary is receiving benefits under a pension plan, or

(Footnote continued from preceding page)

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None of the exceptions in sections 203 and 206 of ERISA is even related to workers' compensation benefits.

Even assuming that the section 401(a)(5) nondiscriminatory provision applies to this forfeiture, it is clear that the provision uses the term "retirement benefits". At issue here are workers' compensation benefits, not retirement benefits in the usual sense. Plaintiffs, again relying on Internal Revenue Service (IRS) interpretations, take the position that workers' compensation benefits are a public retirement program. Plaintiffs base their interpretation on two Revenue Rulings to the effect that disability benefits derived from any state or federal law qualify as public retirement programs for purposes of section 401(a)(5). In one case, Rev. Rul. 62-152, 1962-2 C.B. 126, an offset for disability benfits payable under the Social Security Act was authorized as an acceptable provision in a qualified pension plan which also provided disability benefits.

In the second, Rev. Rul. 68-243, 1968-1 C.B. 157, an offset for benefits payable under workers' compensation was

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(Footnote continued from preceding page)

(2) a participant is separated from the service and has nonforfeitable rights to benefits, a plan may not decrease benefits of such a participant by reason of any increase in the benefit levels payable under title II of the Social Security Act or the Railroad Retirement Act of 1937, or any increase in the wage base under title II, if such increase takes place after September 2, 1974, or (if later) the earlier of the date of first entitlement of such benefits or the date of such separation.

29 U.S.C. § 1056(b) (1975).

approved.[16] This ruling was based on the reasoning that such benefits require employer contributions and are available to the general public. However, the ruling goes on past what plaintiffs cite in support of their position. The sentence following reads: "However, benefits under the plan may not be offset by disability damages recovered by an employee in a common law action against the employer." 1968-1 C.B. at 157, 158. This must surely be a very confusing ruling. Section 386-5, Hawaii Rev. Stat., provides:

> § 386-5 Exclusiveness of right of compensation. The rights and remedies herein granted to an employee or his dependents on account of a work injury suffered by him shall exclude all other liability of the employer to the employee, his legal representative, spouse, dependents, next of kin, or anyone else entitled to recover damages from the employer, at common law or otherwise, on account of the injury.

The statutory provision in Hawaii, as in every other state, preempts any common law remedy an employee previously may have had against an employer. *See Evanson* v. *Univ. of Hawaii,* 52 Haw. 595, 483 P.2d 187 (1971); *Stong* v. *Bucyrus-Erie Co.,* 472 F. Supp. 1089, 1093 (E.D. Wis. 1979).

To include workers' compensation benefits within the "integration" of benefits provided for under section 405 (a)(5), one would have to ignore the nature of workers' compensation. Integration is defined as the "process of

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[16] This ruling was reaffirmed in Rev. Rul. 78-178, 1978-1 C.B. 117.

meshing a government retirement system with a qualified private plan." M. Canan, Qualified Retirement Plans at 256 (1977). Section 401 attempts to allow integration of retirement benefits such as social security and railroad retirement benefits. While in some cases, workers' compensation benefits are awarded concurrently with or subsequent to retirement, the benefits clearly are intended to indemnify workers for job-related injury or disease—not to provide income lost upon retirement.[17] Significantly, the nature of workers' compensation benefits was considered and discussed by the court in *Utility Workers, supra,* and not in *Bordine, supra.*

Under the Hawaii law, both total and partial disability benefits can be awarded on a temporary basis, Hawaii Rev. Stat. §§ 386-31(b), 386-32(b) (1976). In Rev. Rul. 68-243,

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[17] That the benefits are intended to be compensatory is clear from specific sections of the Hawaii law. For example, an employer is liable for personal injury caused either by accident in the course of employment or by disease proximately caused by or resulting from the nature of the employment, Hawaii Rev. Stat. § 386-3. The law also provides that an employer shall furnish medical care, services and supplies, Hawaii Rev. Stat. § 386-21, any artificial limbs or other aids, Hawaii Rev. Stat. § 386-22, medical rehabilitation, Hawaii Rev. Stat. § 386-24, and vocational rehabilitation, Hawaii Rev. Stat. § 386-25. Also indicative of the compensatory nature of the benefits are sections that provide that certain types of injuries shall be deemed permanent and total for purposes of awarding benefits. These include total loss of sight in both eyes, loss of both feet or hands, loss of one hand and one foot and paralysis, Hawaii Rev. Stat. § 386-31. The same is true for the provision concerning partial disability. The loss of a thumb, certain fingers or toes, one hand, one arm, one foot, one ear, among others, constitute partial disability. Hawaii Rev. Stat. § 386-32. For each type of injury, the statute provides for certain periods of coverage for partial disability.

supra, the IRS ruled that benefits that require employer contributions and are made available to the general public may be offset. However, in Rev. Rul. 78-178, 1978-1 C.B. 117, the IRS came upon against its own rule when the question was raised as to offset of unemployment compensation benefits. The IRS ruled that such benefits could not be offset because they are temporary and are not benefits which can be provided under a qualified pension plan even though they are benefits that require employer contributions and are made available to the general public. In that ruling, the IRS conceded that there are many benefits under public programs that cannot be integrated with pension benefits, citing benefits payable under state or federal programs because of sickness as an example. *See* Treas. Reg. § 1.401-1(b)(1)(i). The IRS considered the temporary nature of unemployment benefits to be an important factor in its ruling. These characteristics of unemployment insurance as related to workers' compensation also cast doubt on the usefulness of the IRS interpretation of what constitutes a forfeiture under ERISA. Workers' compensation is basically a program designed to compensate for work-related illness or injury and is often awarded on a temporary basis. The benefits awarded to defendants Lin, Young and Kaai are temporary total disability payments and can be terminated if the Director of Labor and Industrial Relations finds their temporary disabilities have ceased.

The statutory language in ERISA and its legislative history, the compensatory nature of workers' compensation benefits and the clear policy to prohibit forfeitures except in certain specified instances convinces this Court that offsets for workers' compensation benefits as provided for in this pension plan constitute forfeitures under ERISA.

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c. *Individual defendants*

This leaves the final question of whether each of the defendants had reached a stage according to his age or length of employment with the company so that such "forfeiture" or "offset" against his benefits is prohibited.

As to minimum vesting and nonforfeiture, the defendants fall into three categories: (1) voluntary retirement at over the normal retirement age and receiving a Service Retirement Benefit (Edward Young) (2) terminated by the company at below normal retirement age, vested due to a period of over 10 years of service and receiving disability benefits, (Frank Yee and James Jeremiah), and (3) terminated by the company at below normal retirement age with less than 10 years of service and receiving disability benefits (Edmund Lin and Cornelio Kaai).

The disability benefits are exclusive of all other benefits under the plan. That is, these benefits are and will continue to be the *only* retirement benefits received by these defendants. They will not be entitled to receive an additional Service Retirement Allowance upon attaining age 60.[18] This fact is important in characterizing the benefit under ERISA's nonforfeiture and minimum vesting provisions.

(1) Edward Young

The application of the setoff to Young raises two further issues under ERISA: (1) whether he is receiving

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[18] Although this feature of the plan is not clear from the plan itself, plaintiffs filed an affidavit that indicated this is a correct interpretation of the plan.

a "normal retirement benefit" and (2) whether he had attained "normal retirement age" when he retired. Under ERISA, normal retirement benefit "means the greater of the early retirement benefit under the plan, or the benefit under the plan commencing at normal retirement age." 29 U.S.C. § 1002(22) (1975). Young retired at over the age of 60 and took a Service Retirement Allowance under art. V.1.(a) or (b) of the plan. This is a benefit under the plan commencing at normal retirement age. Under ERISA, 29 U.S.C. § 1002(24) (1975), the term normal retirement age means the earlier of—

> (A) the time a plan participant attains normal retirement age under the plan, or
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> (B) the later of—
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> (i) the time a plan participant attains age 65, or
>
> (ii) the 10th anniversary of the time a plan participant commenced participation in the the plan.

Under the plan, "normal retirement *date*" (emphasis added) is defined as the "first day of the month coinciding with or following the Employee's sixty-fifth (65th) birthday." The plan also defines "early retirement date" as "any date prior to the Normal Retirement Date on which the member Retires or is Retired. . . ." It is clear from the plan and from plaintiffs' use of the term in their memoranda that "normal retirement age" is 60, not 65. The plan defines "early retirement" to be a retirement prior to age 60 and an employee may retire and receive a Service Retirement Allowance upon attaining age 60. Upon retirement, Young began receiving a normal retirement

benefit and had attained normal retirement age. Therefore, the offset against his pension benefits is a forfeiture prohibited under ERISA.

(2) Frank Yee and James Jeremiah

Frank Yee retired at age 53[19] with more than 25 years of service and James Jeremiah at age 55[20] with 34 years of service. Both were retired by unilateral action of the company and are now receiving disability benefits. The plan includes alternative (A) under 29 U.S.C. § 1053(a)(2)(1975) which provides: "A plan satisfies the requirement of this subparagraph if an employee who has at least 10 years of service has a nonforfeitable right to 100 percent of his accrued benefit derived from employer contributions." Under 29 U.S.C. § 1002(23)(A) (1975), "accrued benefit" means "the individual's accrued benefit determined under the plan and, . . . expressed in the form of an annual benefit commencing at normal retirement age, . . ." Under the plan, accrued benefit is equivalent to the employee's accumulated contributions plus pension, with pension defined in the plan as "payments under the System for life derived from contributions made by the company."

Both Yee and Jeremiah are receiving disability benefits to which they are entitled because they were retired by the company based on the company's determination that they were permanently incapacitated for the further performance of duty. Under the plan, this type of benefit is exclusive of all others. That is, an employee already

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[19] Frank Yee's birth date is November 19, 1923.

[20] James Jeremiah's birth date is August 14, 1922.

receiving a disability benefit is not entitled to elect to receive an additional Service Retirement Allowance upon attaining age 60 nor a Vested Retirement Allowance at a later date. The disability benefit is calculated as 66⅔ percent of the employee's average final salary and commences immediately upon retirement. The Service Retirement Allowance available at age 60 and after 15 years of creditable service is calculated by multiplying 1.65 percent of the average final salary by the years of creditable service. The company indicates that, in almost all cases, an employee will receive larger periodic payments under a disability benefit than under a Service Retirement Allowance. Both Yee and Jeremiah would have been eligible for a Service Retirement Allowance at age 60 had they not been retired by the company.

Under section 203 of ERISA, an employee is protected against forfeiture of a normal retirement benefit at normal retirement age. "Normal retirement benefit" is defined as "the greater of the early retirement benefit under the plan, or the benefit under the plan commencing at normal retirement age." 29 U.S.C. § 1002(22) (1975). The normal retirement benefit "shall be determined without regard to—

(A) medical benefits, and

(B) disability benefits not in excess of the qualified disability benefit."

Id. A qualified disability benefit is "a disability benefit provided by a plan which does not exceed the benefit which would be provided for the participant if he separated from the service at normal retirement age." *Id.* The description of the term "accrued benefit" in the legislative history

indicates that the term was used synonymously with normal retirement benefit.[21] The point seems to be that an employee has a nonforfeitable right to pension benefits after 10 years of creditable service and upon attaining normal retirement age.

Since the definition of normal retirement benefit excludes disability benefits which do not exceed benefits received if an employee were separated at normal retirement age, this Court concludes that normal retirement benefits do include disability benefits which exceed those which could have been received if the employee were separated at normal retirement age. This interpretation treats the accidental disability benefits received by Yee and Jeremiah as "normal retirement benefits." Therefore, once they reach normal retirement age, 60 under this plan, any offset of workers' compensation benefits constitutes a prohibited forfeiture in violation of section 203 of ERISA, 29 U.S.C. § 1053 (1975). Any offset prior to age 60, though a forfeiture under ERISA, is not prohibited.

Plaintiffs, in order to bring the plan in compliance with the minimum vesting and nonforfeiture provisions of ERISA as to Yee and Jeremiah, must treat their disability benefits as "normal retirement benefits" when each

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[21] Under the conference substitute, the term "accrued benefit" refers to pension or retirement benefits. The term does not apply to ancillary benefits, such as payment of medical expenses (or insurance premiums for such expenses), or disability benefits which do not exceed the normal retirement benefit payable at age 65 to an employee with comparable service under the plan, or to life insurance benefits payable as a lump sum. H.R. Rep. No. 93-1280, 93d Cong., 1st Sess., *reprinted in* [1974] U.S. Code Cong. & Admin. News 5038, 5054.

reaches age 60 or convert each employee's disability benefits into a Service Retirement Allowance at age 60 if the employee chooses that age or a Vested Retirement Allowance at age 65 if the employee chooses the later age. This option of the company must be carried out without any penalty to the employee based on his prior receipt of disability benefits. Any benefit chosen by the employee at or after age 60 is protected against forfeiture under ERISA. The fact that the company unilaterally terminated these employees before the normal retirement age distinguishes their cases from those in which an employee chooses to take early retirement before age 60.[22]

(3) Edmund Lin and Cornelio Kaai

Edmund Lin retired at age 53 with seven years of service and Cornelio Kaai at age 52 with seven years of service. Neither of them satisfied the 10-year period for minimum vesting under the plan and section 203 of ERISA. Therefore, their benefits are not protected against forfeiture under ERISA.

However, defendants also claim that the offset provision is unenforceable because it violates the policy of the State of Hawaii. Specifically, defendants base their claim on a

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[22] The legislative history indicates that ERISA is not intended to protect against forfeiture those employees choosing early retirement. "Also, the accrued benefit does not include the value of the right to receive early retirement benefits, ..." H.R. Rep. No. 93-1280, 93d Cong., 1st Sess., *reprinted in* [1974] U.S. Code Cong. & Admin. News 5038, 5054. This provision of ERISA was the basis of this Court's decision in *Capocci* v. *General Motors Corp.*, 444 F. Supp. 1306 (D. Hawaii 1978), that early retirement benefits are not protected against forfeiture under ERISA.

decision of the Labor and Industrial Relations Appeal Board of the State of Hawaii. The company appealed the award of workers' compensation benefits to Mrs. Pascoe using the offset provision as the basis of its appeal. The company argued to the Appeals Board that it should be allowed to offset pension benefits against workers' compensation benefits—the reverse of the argument made here. Because of the offset provision, the company sought to relieve itself of the obligation under state law to pay workers' compensation benefits. In denying the appeal, the Board stated:

> "Hawaiian Telephone Company seeks to be relieved of its workers' compensation liability to Mrs. Pascoe because the Rules and Regulations of the Retirement System of the Hawaiian Telephone Company state that moneys paid pursuant to the compensation law are to be offset against benefits payable under the retirement plan from Company contributions. In effect, it is attempting to invoke the Board's aid in the enforcement of the retirement system's rules. The strong policy expressed in Chapter 386 against diminution or cancellation of compensation liability through any means, however, precludes the Board from granting the relief sought. See: §§ 386-9, 386-57, and 386-129."[24]

The clear language of Hawaii Rev. Stat. § 386-9 (1976) alone appears to rule out any such offset provision. Section 386-9 reads:

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[23] *See* note 2, *supra.*

[24] Decision and Order of Appeals Board at 3, *see* note 3, *supra.*

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> Contracting out forbidden. Except as provided in § 386-78, no contract, rule, regulation or device whatsoever shall operate to relieve the employer in whole or in part from any liability created by this chapter.[25]

Plaintiffs are obligated under state law to pay any workers' compensation benefits awarded and are obligated by their pension plan to pay pension benefits. In their reply to defendants' motion for summary judgment, plaintiffs dismiss defendants' arguments based on state law as "wholly without merit because Plaintiffs are offsetting pension benefits, not workers' compensation benefits." The problem is that plaintiffs characterize the benefits in question as either workers' compensation benefits (to the Appeals Board) or as pension benefits (to this Court) to suit their arguments at the moment. This leaves the recipients in a carefully constructed Catch 22 in making any claims of entitlement to both benefits.

By including the offset provision in the plan and raising ERISA as support for the provision's validity, plaintiffs are attempting to accomplish indirectly what they cannot accomplish directly. Plaintiffs are required by state law to pay workers' compensation benefits. In distinguishing the same situation in *Utility Workers, supra,* from one in which contractually-incurred severance pay was offset against pension benefits, the court in *Spitzler* v. *New York Post Corp.,* 476 F. Supp. 386, 389 (S.D.N.Y. 1979), pointed out:

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[25] Section 386-78 covers compromises of claims. The exception is not applicable here.

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> The present case differs from *Utility* in one very critical respect. In *Utility*, the workmen's compensation benefit was required by state law; thus, these payments could not be reduced. Instead, the defendant in *Utility* reduced the pension entitlement which was forbidden by ERISA. In the instant case, these severance payments are not required by law. They are purely contractual in nature.

The clear policy of the State of Hawaii to prevent employers from taking any action to reduce their obligations to pay workers' compensation benefits bars any relief declaring that the offset is valid or that plaintiffs have the right to the return of money.[26]

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[26] Any possible issue of federal pre-emption of ERISA of the state workers' compensation law is precluded by the language of ERISA. Section 514(a) of ERISA, 29 U.S.C. § 1144(a) (1975), provides:

> Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. . . .

Section 4 of ERISA, 29 U.S.C. § 1003(b)(3) (1975), provides:

> The provisions of this subchapter shall not apply to any employee benefit plan if—
>
> (3) such plan is maintained solely for the purpose of complying with applicable workmen's compensation laws or unemployment compensation or disability insurance laws;

Cf. Standard Oil of California v. *Agsalud*, No. 78-1095 (9th Cir. Oct. 15, 1980), aff'g 442 F.Supp. 695 (N.D. Cal., 1977).

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Accordingly, IT IS HEREBY ORDERED that plaintiffs' motion for summary judgment is DENIED except as to the application of ERISA to defendant Pascoe and as to a declaration that application of the offset to defendants Lin and Kaai does not constittue a prohibited forfeiture under ERISA as to which partial summary judgment is GRANTED.

IT IS FURTHER ORDERED that defendants' motion for summary judgment is GRANTED as to a declaration that the offset provision in the Hawaiian Telephone pension plan constitutes a forfeiture under ERISA except as to defendant Pascoe.

IT IS FURTHER ORDERED that the defendants' motion for summary judgment is GRANTED as to a declaration that the offset as applied eto defendant Young is prohibited under ERISA and state law.

IT IS FURTHER ORDERED that defendants' motion for summary judgment is GRANTED as to a declaration that the offset as applied to defendants Yee and Jeremiah is invalid as to any offset carried out after Yee and Jeremiah reach the age of 60. Also, at plaintiffs' option, Yee's and Jeremiah's disability benefits must be treated as normal retirement benefits at age 60 or be converted to either Service Retirement Allowances at age 60 if the employee chooses that age or vested Retirement Allowances at age 65 if the employee chooses the later age. Any of these benefits must be treated as a normal retirement benefits subject to the nonforfeiture provisions.

IT IS FURTHER ORDERED that defendants' motion for summary judgment is GRANTED as to a declaration that the offset provision in the Hawaiian Telephone pension plan

violates the Hawaii Workers' Compensation Law as to all defendants.

DATED: Honolulu, Hawaii, December 15, 1980.

Samuel P. King
United States District Judge

Civil No. 78-0483
The Employee Benefits Committee
of the Retirement System of
Hawaiian Telephone Company, et al.
v. Eleanor Pascoe, et al.—
Memorandum and Order